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In The

Supreme Court of the United States

October Term, 1972

Nos. 72-549 and 72-550

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,
Petitioners,

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

CAROLYN BRADLEY, ET AL.,
Petitioners,

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

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Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967) 33

Bradley v. School Bd. of the City of Richmond, 317 F.2d 429 (4th Cir. 1963) 6

Bradley v. School Bd. of the City of Richmond, 345 F.2d 310 (4th Cir. 1965), rev'd, 382 U.S. 103 6

Bradley v. School Bd. of the City of Richmond, 317 F.Supp. 555 (E.D. Va. 1970) 6, 7, 14, 38, 53, 54

Bradley v. Schoool Bd. of the City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971) 6, 13, 14, 15

Bradley v. School Bd. of the City of Richmond, 51 F.R.D. 139 (E.D. Va. 1970) 6

Bradley v. School Bd. of the City of Richmond, 338 F.Supp. 67 (E.D. Va. 1972) 2, 30

Bradley v. School Bd. of the City of Richmond, 462 F.2d 1058 (4th Cir. 1972) .... *passim*

Brown v. Board of Education, 347 U.S. 483 (1954) .. 5, 47, 51, 61, 105

Brown v. Board of Education, 349 U.S. 294 (1955) 51, 75

Brunson v. Board of Trustees of School District No. 1 of Clarendon County, 429 F.2d 820 (4th Cir. 1970) 23, 47, 59, 60, 61, 75

Green v. School Bd. of New Kent County, 382 F.2d 338 (4th Cir. 1967), rev'd 391 U.S. 430 (1968) 8, 33, 47, 51, 52

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Holt v. City of Richmond, 459 F.2d 1093 (4th Cir. 1972) 4, 71

Holt v. City of Richmond, 334 F.Supp. 228 (E.D. Va. 1971), rev'd 459 F.2d 1093 (4th Cir. 1972) 17, 72

Howard v. County School Bd., 203 Va. 55, 122 S.E.2d 891 (1961) 39, 83

Hunter v. Erickson, 393 U.S. 385 (1969) 69

James v. Valtierra, 402 U.S. 137 (1971) 69

Mahan v. Howell, ... U.S. ....., (Nos. 71-364, 71-373, 71-444, decided February 21, 1973) 49, 95, 96

McLeod v. County School Bd. of Chesterfield County, (unreported case, E.D. Va. 1962) 8

Sailors v. Kent Bd. of Education, 387 U.S. 105 (1967) 96

San Antonio Independent School District v. Rodriguez, ... U.S. ....., (No. 71-1332, decided March 21, 1973) 37, 38, 40, 49, 92, 93, 101, 102, 104

School Bd. of Carroll County v. Shockley, 160 Va. 405, 168 S.E. 419 (1933) 39, 83

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Spencer v. Kugler, 326 F.Supp. 1235 (D. N.J. 1971) aff'd, 404 U.S. 1027 (1972) 49, 94, 95

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Section 22-203 38

Section 22-206 38

Section 22-222 39

Section 22-231 38

Section 22-318 38

Section 25-232 39

Section 36-86 74

COPY BOUND CLOSE IN CENTER

Other Authorities

Page

Bell, John W. and Arthur S. Green: "Why Not Vertical Administration?" American School Board Journal, December, 1957 100

Bureau of the Census, U.S. Department of Commerce: The American Almanac: The U.S. Book of Facts, Statistics and Information for 1973, 1972 ..... 62, 63, 64

Conant, James B.: The American High School Today, 1959 100

Cook, Katherine M.: Reorganization of School Units, U.S. Office of Education, Bulletin No. 15, 1936 100

Dawson, Howard A.: Satisfactory Local School Units, Field Study No. 7, George Peabody College for Teachers, 1934 100

Faber, C. F.: Measuring School District Quality, American School Board Journal, October, 1964 100

Faber, Charles F.: The Size of a School District, Phi Delta Kappan, 1966 100

Friedman, ed., Argument: The Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55, 1969 ..... 75, 76

Grieder, Calvin, Truman M. Pierce and K. Forbis Jordan: Public School Administration, (New York: The Ronald Press Company, 1969) 100

Hickey, Michael E.: Optimum School District Size, ERIC Clearinghouse on Educational Administration 100

Jencks, Christopher: Inequality: A Reassessment of the Effect of Family and Schooling in America (1972) 76, 77

Mort, Paul R. and Walter C. Reusser: Public School Finance, Second Edition, 1951 100

Report of the Commission on Constitutional Revision (1969) 34, 35

Swanson, Arthur D.: Relations Between Community Size and School Quality, Institute of Administrative Research, Research Bulletin, October, 1961 100

Washington Post, February 28, 1973 77

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinions in the Court of Appeals for the Fourth ircuit are reported at 462 F.2d 1058 and are printed in e Appendix to Petition for Writ of Certiorari filed by e School Board of the City of Richmond, et al., in No.

72-549 at pp. 557a-602a.* The opinion of the District Court for the Eastern District of Virginia is reported at 338 F.Supp. 67 and is printed in the same appendix at pp. 164a-545a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petitions were timely filed pursuant to ex parte orders extending the time for filing entered by Mr. Justice Douglas and Mr. Justice Marshall. Certiorari was granted on 15 January 1973.

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred in holding that the District Court could not compel the joinder of three separate school systems—each already operating a unitary school system, the boundaries of which, under state law, are co-terminous with long-standing city and county lines—where the sole purpose and effect of the proposed joinder was to assure a white majority in each city school of not less than 60% and not more than 80%?

2. Whether the Constitution or any decisions of this Court require that a unitary city-wide school system be judicially reconstructed by adding to it two unitary county-

* Citations in this brief in the form "A. ....." refer to the Joint Appendix filed by Petitioners in Nos. 72-549 and 72-550. Trial exhibits are designated "PX" for plantiffs', "RX" for the Richmond School Board's, "CX" for exhibits of the Chesterfield School Board or Board of Supervisors, "HX" for exhibits of the Henrico School Board or Board of Supervisors, and "SX" for exhibits of the State Board of Education and State Superintendent of Public Instruction. In addition, citations to exhibits reprinted as part of the Appendix in a separate volume are given in the form "Ex. A. .....". Citations in the form "Pet. A. ....." refer to the separate Appendix of Opinions Below and relevant state statutes filed with the Petition in No. 72-549.

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wide school systems in order to assure a white majority in each city school?

3. Whether the Constitution or any decisions of this Court require the obliteration of centuries-old boundary lines between the Counties of Henrico and Chesterfield and the City of Richmond solely to assure white-majority schools in the City of Richmond, when these lines are not, were not, and never have been manipulated to inhibit desegregation or to promote segregation?

CONSTITUTIONAL AND STATUTORY PROVISIONS

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const., Amend. XIV, § 1.)

* * *

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (U.S. Const., Amend. X.)

STATEMENT

A. General Background

The City of Richmond, the County of Henrico, and the County of Chesterfield are local government units within the Commonwealth of Virginia.[1] They have a history dating

[1] "In Virginia, cities and counties are mutually exclusive. The area embraced within a city's limits is not a part of a county. Cities expand

back two and one quarter centuries. Henrico County was created in 1634; the City of Richmond in 1742; Chesterfield County in 1749. In the interim, the City of Richmond has enlarged its territory by annexation on eleven different occasions, most recently in 1970. These annexations were the only governmental actions affecting the racial composition of the school systems. Their effect has been to increase the percentage of the white population within the City of Richmond.

These three political subdivisions are charged with the general functions of local government within their geographic boundaries. Plaintiffs concede that the establishment of the boundaries of the City and the Counties was not racially motivated. Each governing body is elected by popular vote and exercises the power to tax to provide revenues for all governmental functions, including the function of public education which has been a local government function for over one hundred years. The school systems that are the concern of this case are administered by school boards, appointed in one county by the Board of Supervisors, in the other by a court appointed School Trustee Electoral Board and in the city by the City Council. The fiscal powers of taxation and borrowing are vested in the elected governing body of each political subdivision and not in the school boards.[2] In addition, in the Counties, bond

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at the expense of the territory of an adjacent county, and Virginia has provided a judicial procedure as the means for extending the limits of cities." *Holt* v. *City of Richmond*, 459 F.2d 1093, 1094 (4th Cir. 1972).

[2] "Virginia's school divisions differ from those of most other states in their fiscal dependence; that is, the lack of independent authority to tap local sources of revenue for school purposes. Their annual budgets and authorizations for issuance of bonds for capital outlay must receive the approval of local boards of supervisors." 1 Virginia Educational Needs Assessment Study 336 (1970). (RX 69; Ex. A. 19e-20e)

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issues for school construction must be approved by the people in referendum.

This case derives from an attempt to dismantle these three unitary school systems, to separate each from its local government, and to create one new and distinct school system which would be financially dependent upon three separate local governments and would be so large as to be in the top 0.2% of all school systems in the United States. The ostensible excuse for this requirement that the state restructure its internal government was to "desegregate" the school system of Richmond, for desegregation of school systems was the extent of the charge to the federal courts by this Court in the series of cases beginning with *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and culminating in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), reh. denied, 403 U.S. 912 (1971).

The fact is, however, that the Richmond schools and the Chesterfield and Henrico schools had already been desegregated—they were and are operating as unitary systems—unless by "desegregation" is meant a school system in which there must be a white majority or a racial balance approximating the racial ratio of the three adjacent school systems, both in the combined system and in each school within that system. Indeed, the announced objective of the plan ordered into effect by the district court was to do more than require a simple white majority. To satisfy its notions of "desegregation"—usually transmogrified into a "viable racial mix"—the district court would require a white majority of no less than 60% and no more than 80% in each school within the system.

It was this court ordered plan for a "viable racial mix"—for large white majorities in each school—that the Court of Appeals rejected and that this Court is asked to restore.

We submit that an order requiring white majorities in all schools is not only not mandated by the Constitution or by this Court but would in fact violate the Constitution and the judgments of this tribunal.

B. Origin Of This Litigation

This litigation began on September 5, 1961, with the filing of a class action by the plaintiffs to secure a racially non-discriminatory school system within the City of Richmond. The cruise of these proceedings can be traced through the opinions of the District Court, the Court of Appeals for the Fourth Circuit, and this Court. See *Bradley* v. *School Board of the City of Richmond*, 317 F.2d 429 (4th Cir. 1963); 345 F.2d 310 (4th Cir. 1965); 382 U.S. 103 (1965); 317 F.Supp. 555 (E.D. Va. 1970); 325 F.Supp. 828 (E.D. Va. 1971); 51 F.R.D. 139 (E.D. Va. 1970).

The phase of this litigation with which we are concerned here began in 1970, with a request for further relief by the black plaintiffs against the City of Richmond, demanding that the City establish a unitary system. Prior thereto, the respondents had not been parties to the case, nor had the plaintiffs deemed it necessary or appropriate to join them at that time in order to accomplish the goal of their motion.[3] The district court found that Richmond was not operating a unitary system but concluded that a plan proposed by the plaintiffs and limited to the City would remedy that defect.

[3] At this time it had not occurred to plaintiffs to allege, or the district court to conclude, that a system in which most of the schools were majority black would not be unitary, even though the schools in neighboring Chesterfield and Henrico were approximately 90% white. Nor had it occurred to them that no unitary system *could* be created without the inclusion of white students from these contiguous counties.

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Under that plan, known as the Foster Plan, "the student bodies at the respective schools [ranged] from a black population of 39.2% to 71.8%, although most schools ranged between 50 and 65%." 317 F.Supp., at 568.

About that plan the trial court said (317 F.Supp., at 568):

> Through Dr. Foster the plaintiffs proposed a plan described below, *which the Court finds would result in a unitary system.* (Emphasis added.)

By order entered August 17, 1970, the defendant City was required to implement the plan for the desegregation of the high schools and intermediate schools, but full desegregation of the elementary schools, as called for by the Foster Plan, was not ordered as that would have required extensive cross-town busing, and the City demonstrated its inability to acquire the necessary buses by the start of the 1970-71 session. The Interim Plan for the high and intermediate schools was put into effect in September, 1970, and was the plan in operation for the school year 1970-71 in the City of Richmond. In its order of August 17, 1970, the district court directed the City to file within ninety days a plan for the complete desegregation of all of its schools.

On November 16, 1970, the City advised the court that three definitive plans would be submitted on January 15, 1971, in compliance with the order of August 17, 1970. Two days later, on November 18, 1970, the City filed a "Motion to Compel Joinder of Parties Needed for Just Adjudication under Rule 19." The motion sought to join, as parties defendant, the Board of Supervisors of Chesterfield County, the Board of Supervisors of Henrico County, the School Board of Chesterfield County, the School Board of Henrico County, the State Board of Education, and the Superintendent of Public Instruction.

At the time of this motion, the school systems in both Chesterfield and Henrico had been converted to unitary systems in accordance with the requirements established by this Court in *Green* v. *County School Board*, 391 U.S. 430 (1968).

C. The Chesterfield School System

In 1962, a suit was filed in the District Court under the style, *McLeod* v. *County School Board of Chesterfield County* (PX 147). A general injunction against discrimination in the assignment of students was entered, and the case has lain dormant on the docket while the county effectuated first a freedom of choice plan and more recently a unitary geographical attendance zone plan.

With the advice and guidance of the Department of Health, Education and Welfare (HEW), the county in 1969 and 1970 closed all of its formerly all black schools, some of which have since been reorganized and re-opened as integrated schools with attendance zones drawn upon a non-racial basis (CX 14, 16, 17, 18, 31, 33; RX 115; A. 1000a, 1001a, 1021a).

The operation of schools in Chesterfield County has at all times met with the approval of HEW until the evidentiary hearings in this case commenced. During the late summer of 1971, HEW raised objection to the continued operation of the Matoaca Laboratory School as a racially identifiable (black) facility, if Chesterfield was to continue its participation in the school.

In no real sense may Matoaca Laboratory School be considered a part of the school system operated by the Chesterfield County School Board. It is owned by and operated as a part of Virginia State College. Virginia State is a predominantly black college. The Laboratory School is utilized

by the College in its teacher education program, and possesses superior educational facilities. The administration of the College has historically selected the students who would attend, and Chesterfield's connection with the school has been to provide some incidental services and transportation for the students and to remit to the College the funds received from the State for the average daily attendance of the students assigned there. The county has had no part in the selection or payment of the faculty, the selection of its students or the operation of the school (A. 1021a-1023a).

Upon receipt of the HEW objection, the Chesterfield School Board informed Virginia State College that it could no longer participate in the operation of the school and the connection was severed by mutual agreement (A. 1023a-1024a).

The school system of Chesterfield County, operating under the injunction of the district court and the directions of HEW, is unitary. School attendance zones were not drawn to accomplish racial purposes or for the purpose of concentrating blacks in any school (CX 33). The attendance system is based upon "proximal geographic zoning" with all children, black or white, living within a particular zone attending the school serving that zone.

A comparison of the racial ratio at each school with the pot maps (CX 14) and the census tract maps showing racial distributions of population (CX 39, PX 98) demonstrates that any variations in racial ratios in the schools exist by virtue of residential patterns. The black population of the county is spread generally throughout the county, with the result that there is no school zone with a majority black population. Therefore, there is no school with a predominantly black student body. Every black child in Chesterfield attends a racially desegregated facility.

D. The Henrico School System

Prior to the school year 1969-70, the Henrico County schools were operated on a geographical attendance zone and freedom of choice interim desegregation plan approved by HEW. For the school year 1969-70, a terminal desegregation plan was adopted by the Henrico County School Board which entailed: (1) the temporary closing of certain schools which had remained all-black schools under the interim desegregation plan, (2) the reassignment of all students formerly attending such schools to other schools in accordance with geographical attendance zones (A. 954a-955a).

On November 28, 1969, some three months after the opening of schools under this terminal plan and following an inspection of the Henrico County schools by Dr. Haddock, a member of the staff of the regional Civil Rights Director of HEW (Director), the Division Superintendent of Schools of Henrico County (Division Superintendent) was advised in writing by the Director (Ex. A 97e):

> According to his [Dr. Haddock's] report, you are now operating a unitary, nonracial school system in which no schools are racially identifiable. You, your school board, and your staff are to be commended for the leadership you have shown in meeting the provisions of Title VI of the Civil Rights Act of 1964 and, even more important, providing an equal educational opportunity for all of the students in your school division.

A year later, in a letter of December 10, 1970, again approving the Henrico County system, the HEW Director also stated that the School Board should "utilize every feasible means to further remove the racial identifiably of the Central Gardens student body . . ." (Ex. A. 99e). The Central

Gardens school had housed an all-white student body in the school year 1964-65 (A. 589a). Because of changing residential patterns, the racial composition of the student body had become predominantly black (A. 589a). On May 26, 1971, in response to this admonition, the Division Superintendent apprised the Director that new attendance zone lines had been established to comply with HEW's request (Ex. A. 107e). On June 30, 1971, the Director approved the proposed reorganization in the following language (Ex A. 110e):

> This organization appears to meet the requirements of your continuing responsibility to remove the racial identifiability of Central Gardens as referred to in our letter of December 10, 1970. It also is in accord with the principles enunciated by the Supreme Court on April 20, 1971, in the case of *Swann* v. *Charlotte-Mecklenburg*.
>
> We appreciate the leadership you have shown and look forward to receiving your faculty information."

On April 20, 1971, the HEW Director had informed the Division Superintendent of the approved rule for faculty desegregation (Ex. A. 103e). On May 13, 1971, the Division Superintendent advised the Director that appropriate reassignment o fteachers would be made in accordance with that rule (Ex. A. 105e). On August 11, 1971, the Director addressed a letter to the Division Superintendent approving the faculty assignments so made (Ex. A. 113e).

Manifestly, the Henrico County School Board is operating a unitary, non-racial school system in which no schools are racally identifiable. The Henrico School system complies fully with all judicial and executive guidelines. This system, which was approved by HEW before trial of this case began, was in actual operation at the time of the final decision

by the district court. It is uncontroverted that, on four separate occasions during the past two years, the school authorities have been commended by HEW for their leadership in meeting the provisions of Title VI of the Civil Rights Act of 1964 and in providing an equal educational opportunity for all of the students in the school division (Ex. A. 97e, 101e, 109e, 113e). It is uncontroverted that during that period no recommendation has been made by HEW to the Henrico County school authorities concerning the operation of its schools under the Civil Rights Act of 1964 which has not been followed by the School Board (A. 964a).

E. The Richmond School System

Pursuant to the motion for joinder described above, Chesterfield, Henrico, the State Board of Education and the Superintendent of Public Instruction were joined as parties defendant and plaintiffs were directed to file an amended complaint. It was not until the City of Richmond was faced with an order to effect a unitary system, which would result in desegregated schools with predominantly black student bodies in virtually every school in Richmond, that the City sought to secure an amalgamation of its school system with the unitary school systems of the adjoining counties. It is significant that the plan which the Court of Appeals struck down was proposed by Richmond, with its majority white voting population and predominantly white government, and not by the plaintiffs who, over a decade of bitter opposition by the City, had sought the desegregation of the Richmond schools. The plaintiffs continued to seek implementation of their Foster Plan for a unitary system within the city until they were directed by the district court to seek the broader relief suggested by the City.

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The amended complaint was filed on December 14, 1970. Answers and various motions were filed by the new defendants. Pending a hearing on the issues raised by the new pleadings, the City filed the three proposed plans referred to in the report submitted to the district court on November 16, 1970.[4] A separate hearing was held on these plans in March, 1971, to determine under what plan the schools of the City of Richmond would be operated during the 1971-72 school year.

Plan III,[5] proposed by the City and limited to the City's geographical boundaries, modified the Foster Plan and was chosen by the district court as the more appropriate program because, while it too would effectuate a unitary system, there were other advantages that it would also secure. As the trial court said: "Although operation under either plan would fulfill the School Board's legal duty, it would be fully justified in preferring plan 3 on the basis of whatever administrative or educational reasons it finds persuasive." *Bradley* v. *School Board of Richmond*, 325 F. Supp. pp. 828, 846; Pet. A. 146a. This unitary system was ordered to begin with the 1971-72 school year and, indeed, has been in effect since then.

The Foster Plan

Following hearings in June 1970 on the motion for further relief filed by the black plaintiffs, the district court found that the Foster Plan presented by plaintiffs would, as they asserted, achieve a unitary school system within the City of Richmond. Under that plan, as previously noted,

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[4] Plans 1, 2 and 3, numbered in order of Richmond's preference for each, were offered simultaneously. The district court found that Plans 1 and 2 failed to establish a unitary system. (Pet.A. 116a-118a)

[5] The terms "Plan III" and "Plan 3" are used interchangeably by the District Court and the Court of Appeals and refer to the same plan.

the student bodies at the respective schools ranged from a black population of 39.2% to 71.8%, although most schools ranged between 50% and 65%.

Concerning the Foster Plan, the trial court said (317 F.Supp., at 568, 576; Pet. A. 24a, 41a):

> Through Dr. Foster the plaintiffs proposed a plan described below, which the Court finds would result in a unitary system.
>
> * * *
>
> The Court therefore concludes:
>
> * * *
>
> 2. That the plaintiffs' plan would, if adopted, create a unitary system.
>
> * * *
>
> 4. That while racial balance is not required in each and every school in the system, there is no intractible remnant of segregation in the City of Richmond school system since all parts of the city can be reached by virtue of reasonable amounts of transportation, both as to distances, times and sums involved.
>
> The Court further finds that the adoption of a plan such as suggested by Dr. Foster may well not only create a unitary system, but do much toward the thwarting of resegregation of schools once the unitary system has been put into effect.

PLAN III

As previously noted, the City of Richmond proposed a unitary plan of its own limited to the City's geographical boundaries, which was similar to the Foster Plan and known as Plan III. Concerning this plan, the district court stated (325 F.Supp., at 834-835; Pet. A. 119a, 121a):

> Plan 3 is a different matter. The administrators outline their goals in this manner:
>
> "Plan III represents an effort on the part of the School Board to develop a plan for the operation of

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the Richmond Public Schools in which the attempt is made to remove from the public schools all vestiges of racial identity. The removal of all vestiges of such alleged identity involves whatever means are at the disposal of the School Board. These means include extensive busing of students, proximal geographic zoning, pairing, clustering, satellites, and racial balance among faculties.

* * *

"At the elementary level all schools will have a minority-majority ratio in which each group will be at least one half or 50 percent of the projected city-wide ratio for that group.

* * *

"Thus, a given school would have a projected enrollment of at least 17 percent white, or at least 33 percent black.

* * *

"Attendance zones at the middle school and high school levels have been adjusted to provide projected minority-majority ratios in accordance with the formula stated above for the elementary level."

* * *

. . . the School Board, if this proposal succeeds as planned, will have eliminated the racial identifiability of each facility to the extent feasible within the City of Richmond. This is the extent, under current law, of the affirmative obligation governing use of its available powers: to do away with a system under which one may confidently predict those schools which a given child may attend, and those from which he is effectively barred, by reference to his race.[3]

[3] This conclusion is based upon what can be reasonably expected within the geographical boundaries from which the students for whom the School Board now has responsibility come.

As shown by the report submitted to the court following the opening of schools (RX 98), the plan achieved its announced goals, for the report shows the city enrollment (as of September 7, 1971) to be in a racial ratio of 69% black to 31% white, and the distribution of pupils in the various schools produced a white-black ratio (in all but four of the 57 schools) in which each race had at least one-half or 50% of the city-wide ratio for that group. In the other four schools, the racial ratio is not substantially disproportionate to the projected goal. Clearly, Plan III produced a unitary system in the City of Richmond as the district court found that it would.

The schools of the City of Richmond are being operated at the present time under Plan III which admittedly established a unitary system within the City of Richmond. Indeed they had been operated in this fashion for some four months before the "time of final decision by the district court" decreeing consolidation.

In their statement of the issue plaintiffs invoke the district court's "finding" that at the time of final decision the Richmond School Board was in violation of the Fourteenth Amendment. Viewed in the light of the "conclusion" reached by the district court in approving Plan III ,it becomes obvious that the "finding" asserted by the plaintiffs to establish a constitutional violation must depend upon the proposition that the Fourteenth Amendment forbids the existence of a majority black, though unitary, system alongside a majority white, though unitary, system.

F. The Proposed Consolidation Plan

As previously noted, it was only after the district court stated its approval of the Foster Plan that the City of Richmond came forward with its gerrymandering proposal

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to bring Henrico and Chesterfield Counties into a single school system. What its motives were can only be surmised. Nevertheless, it was at the same time that, in a class action suit brought by and on behalf of black citizens of Richmond, the trial judge in this case said of the most recent annexation of territory by the City of Richmond: "The Court finds that the primary reason [for the annexation agreement] was in order to assure an unquestioned White majority for the upcoming Councilmanic Elections." *Holt* v. *City of Richmond,* 334 F.Supp. 228, 236 (E.D. Va. 1971). Whatever its motives, the effect of the plan would have been to borrow white children from Chesterfield and Henrico so that the white school children of the City of Richmond would be assured of attending schools in each of which there would be a substantial white majority.

Following five weeks of trial in August and September, 1971, the district court, on January 10, 1972, ordered that the three school divisions of Richmond, Henrico and Chesterfield be consolidated and that a plan designed to create a majority white student body in each school be implemented. The order further required that the school boards of the three political subdivisions ,each of which is vested with the constitutional obligation to supervise the schools in its system, be abolished and a single school board created in their place, and that the school properties held by each separate school division as the public property of its citizens and taxpayers be transferred to the newly decreed joint school board. The plan thus mandated requires the interchange of black and white students between the independent political subdivisions to avoid a black majority in any school. (Pet. A. 536a)

The School Consolidation Plan which the City proposed was summarized by its proponents in the following way (A. 143a-146a):

Summary Of Plan

1. The plan is aimed at providing meaningful integration and equal educational opportunity at every school in the Richmond metropolitan area.

2. All schools will reflect a viable racial mix as the primary means to insure not only the achievement of educational goals, but also the attainment of over-all stabilization throughout the system.

3. Free transportation will be provided for all pupils throughout the consolidated division in accordance with existing state standards.

4. The racial composition of the faculties in each school will approximate the racial composition of the subdivision in which the school is located. Exceptions will be made for specialized faculty positions.

5. Recommended organizational structure of consolidated school division:

(a) Consolidated division will be composed of six subdivisions each containing a viable racial mix of black and white students reasonably reflective of the racial composition of the metropolitan area.

(b) Each school within a particular subdivision will contain a viable racial mix.

* * *

A. Rationale For Consolidated Plan

The racial composition of the student population of the three Richmond metropolitan area political subdivisions has been approximately 67 per cent white and 33 per cent black for more than ten years. A racial mix in each school in the Richmond metropolitan area which approximates that of the entire area will be productive of a viable racial mix of black and white students and will provide meaningful integration for all pupils within the consolidated division.

* * *

B. Plan Of Organization

* * *

The six subdivisions will contain a total student population and racial composition as follows:

Subdivision	*No. of Students*	*Per Cent White*	*Per Cent Black*
No. 1	18,123	62.6	37.3
No. 2	20,059	63.4	36.5
No. 3	17,749	64.7	35.2
No. 4	19,086	62.7	37.2
No. 5	19,594	70.0	29.9
No. 6	9,387	81.6	18.3

* * *

Student Assignment

* * *

. . . Where racial imbalances exist, however, students will be exchanged between schools within their particular subdivision in order that a viable racial mix may be maintained in each school in that particular subdivision. Where racial imbalances necessitate the exchange of students between schools, it is recommended that the pupils to be exchanged be selected by any one of the following methods or any combination thereof:

* * *

(3) objective selection, such as utilization of dates of birth.

On the question what is a "viable racial mix," the testimony of the proponents of the plan was clear and unwavering. Dr. Little, Associate Superintendent of the Richmond Schools, was the author of the plan for the Richmond School Board. He testified as follows on direct examination:

Q What was the starting point in devising this plan, sir? A Well, there were a number of starting

points in this. First thing that had to be determined is what are your objectives in the establishment of such a plan.

The objectives that were sought or were aimed for, number one, that each and every school within the City of Richmond, Henrico and Chesterfield County, would be composed of a viable racial mix. (A. 195a)

* * *

Q . . . would you give the factors that you considered in preparing the subdivision breakdown or the subdivision lines? A I believe, as I indicated, factor number one would be that each subdivision at each level and each school would contain a viable racial mix. (A. 201a-202a)

* * *

The Court: So we get the record straight, Dr. Little —I will try not to interrupt counsel again—what was your criteria for viable racial mix?

You used that phrase, and I wondered what you meant by it.

The Witness: Viable racial mix, I mean that, in my opinion, it is a racial mix that is well enough established that it will continue to prosper. It will be a desirable [A-186] reasonable racial mix for educational purposes, as well as meeting the judicial requirements in that.

Generally the parameter ranges from 20 to 40 percent in each school. We have not quite attained that in subdivision six, because I believe there are some instances around 17 percent and in one instance here we are dealing with maybe 40. —well, in subdivision one 40.18. But the general range we are shooting for was 20 to 40 percent in each and every school, and in each and every subdivision. (A. 214a)

* * *

Q Coming to your overall evaluation of the plan, Dr. Little, I wish you would summarize what, in your

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opinion, constitutes the merits of this plan, or any comparable Metropolitan Plan for the Richmond Metropolitan area? A We started out with some objectives to this plan. One of those was the injection of the component of a viable racial mix in each and every school to produce a quality education as a component of a quality education program. I believe this plan will provide the environment for it. Again, how it is implemented will have a lot to do with the quality of the education, but I think that this will create an environment for quality education with the component of a viable racial mix in each and every school in the metropolitan school system. (A. 242a-243a)

On examination by plaintiffs' counsel:

Q . . . What, if you wanted to determine a viable racial mix for a school community, what would you look at? A I would look at the community and what it had.

Q In terms of its pupils? A In terms of its pupils.

Q And the racial composition? [B-59] A And the racial composition, yes.

Q And is that what you have done here in setting up the perimeters [sic] and your goals for the consolidated school plan, or the desegregation plan for the City and the community of Richmond? A Yes. But we are shooting—we were shooting at here the same thing I indicated to you in interrogatories very early in this case when I used somewhere around 30 percent, because I do feel that when you get too much below 30 percent your black child is in isolation and he does not benefit from the experience. When you get too far over that you run into resegregation and a lot of disadvantages of the all-black school.

But yes, in direct answer to your question, yes, for certain we looked at what we had in Richmond and

> fortunately we had a situation where that viable racial mix was available, but not properly dispersed. (A. 250a)

On further questioning by Mr. Lucas, plaintiffs' counsel, Dr. Little said that were that racial mix not available he "would work within the City of Richmond and would not recommend this merger." (A. 253a)

On cross-examination by respondents' counsel, the same adherence to the concept of a viable racial mix was maintained by Dr. Little:

> Q . . . the only reason, really, for the consolidation that you are suggesting, is to bring about the racial balance that you think is appropriate, as much as you can get for each race to associate with [B-121] the other, and not to reach a theoretical tipping point when the process might be reversed and the benefits might be lost. A My only objective in this is to provide an environment for quality education program for the boys and girls of Henrico and Chesterfield County. It is my opinion that a desirable racial composition is a component to a quality education program.
>
> Q And that ratio ought to be what? A That a desirable ratio is a range between 20 and 40 percent.
>
> Q Of black? A Of black, yes, sir. (A. 262a)
>
> * * *
>
> Q . . . If the population of Richmond was 70 percent white or 30 percent black, and the population of Henrico was 70 percent white and 30 percent black and the population of Chesterfield was also 70 percent white and 30 percent black, and the schools within the area reflected that racial composition, would you recommend the school consolidation? A No, I would not recommend this school consolidation, but I would recommend that Henrico and Chesterfield merge with

the counties that are adjacent [B-174] to them that are predominantly black.

Q In other words there is no educational reason, as far as the school system of the City of Richmond is concerned, or any community of interest with the City of Richmond, that would prompt you to make this recommendation that is being made here? A There are certain efficiencies for a large operation that I think would make it desirable, but I don't think that the motives that have caused this suit to be instituted would be present. (A. 263a-264a)

The next "expert" witness on behalf of the consolidation plan was Dr. Thomas Pettigrew, whose name has appeared in a number of "desegregation" cases as an advocate of his scheme for a "viable racial mix." See, *e.g., Beckett v. School Bd. of the City of Norfolk*, 302 F.Supp. 18, 308 F.Supp. 1274 (E.D. Va. 1969), *rev'd, sub nom., Brewer v. School Bd. of the City of Norfolk*, 434 F.2d 408 (4th Cir. 1970); *Brunson v. Board of Trustees of School District No. 1 of Clarendon County*, 429 F.2d 820 (4th Cir. 1970). His testimony on behalf of the plan adopted by the Court was consistent with that of Dr. Little as to the educational desirability and primary objective of a ratio of blacks to whites not to be more than 40:60 nor less than 20:80. Thus, on direct examination, he testified as follows:

Q Based on your research and the studies in the field, is there some type of point at which an environment for meaningful integration, or the term you used earlier, viable racial mix, becomes a possibility? A Yes, sir. You can't make hard and fast rules right down to a single percentage point or anything like that, but I can say with great confidence, and I might say I have been seeing the same thing, increases since I began as an expert witness in the Barksdale case in Springfield in 1965, that the most appropriate effective

percentage, I think, for interracial maximizing the opportunity of getting integration in the way I have just defined it, would be from 20 to 40 percent black.

And I would like to explain that a little, if I may, Mr. Little.

Q Yes, sir. A At the 20 percent level, I think below that, and I don't want to make an argument between 17, 18 and 20, obviously, but I am talking about 20 and ten, you know, I don't to make [*sic*] any case two or three percentage points in either direction, but I am talking about a real range between 20 and 40. I think below 20, [C-17] frankly, is tokenism and it has harmful effects. I think it fails to maximize some of the possibilities of the positive effects of integration. (A. 273a)

* * *

At the other end, the 40 percent, in the Barksdale case I had said 20 to 45 and I might say I said that before the Coleman Report and that is because the Coleman Report findings did not in fact surprise me. They were very similar to many that had already been established, but in much smaller definitive studies. I moved down from 45 to 40 on the basis of what I learned in working for the Commission of Civil Rights about stability. I really think that the 40 [C-18] percent figure relates in particular to stability.

* * *

. . . but it is a general statement that can be confidentially [*sic*] made that as you get above 40 percent you will have great difficulty maintaining stability of the racial percentage. And you are very likely to go from 45 to 50 very rapidly to 75 and more. So I learned this first with the Commission on Civil Rights which study gave me the first chance to look at education all over the country intensively. (A. 274a-275a)

In discussing an example of this phenomenon, Dr. Pettigrew emphasized:

. . . That is a national trend in urban systems. So I would argue that 20 percent avoids tokenism and 40 percent maintains stability. The 20 to 40 percent mix maximizes possibilities for integration and the positive benefits for integration that I previously outlined. (A. 275a)

Dr. Pettigrew further testified:

Q Doctor, are you familiar with the projected racial composition of all of the Richmond schools under [C-22] Plan III which will be implemented in two weeks? A Yes, sir, in a general way.

* * *

Q Have you made an analysis of the number and percentage of Richmond students who will be attending schools in the range of 20 to 40 percent black under Plan III? A Yes, sir. For both white and black students, as is clearly evident in Exhibit 70, Plan III will not provide this at any of the levels for either race.

Q Would you show what percentages are, say, at the elementary level within the 20 to 40 percent range and the blacks and the whites? A Well, K through five, kindergarten through five in the elementary level for black students is only three percent, 3.04. For white students it is 9.43. Percentage of the white students will be in the [C-23] range of 20 to 40 percent. I assume that includes the 41 percent school or 19 percent school.

The middle level, six to eight, only 9.2 percent of the black students would be in the range of 20 to 40 percent black schools. 26.76 percent of the white students would be in such optimally arranged schools.

At the high school level, nine through twelve, none of the black students and none of the white students would be in the type of school I have been describing as having maximal potential for integration.

Q Well, now in your opinion then as a specialist in race and education, what is the likelihood of their

[*sic*] being, under Plan III, meaningful integration, quality education in the public schools of Richmond under Plan III? A Well, Mr. Little, Plan III may well be—I haven't studied it in detail and I was not part of this case when Plan III, of course, was up for discussion—it may well be, as best I know, the best available alternative in a non, or even antimetro context that it was drawn up in. It is certainly not, however, a situation that it likely to be stable, in [C-24] my opinion, based on experience of other districts throughout the urban America. It is certainly not ideal, obviously, given my thoughts that I have already expressed about the maximal benefits available under 20 to 40 percent black. In other words, I think it pales beside the proposed Metropolitan Plan in potential effectiveness.

* * *

. . . Yes, sir. Under the proposed consolidated division, 97 percent of the black students would attend schools in the range of 20 to 40 percent with the remaining three percent being in 15 to 20 percent black schools, which doesn't upset me too much.

[C-27] Under the proposed Metropolitan Plan, 92.5 percent of the white students could avail themselves of the opportunity of attending such schools and the remaining 7.5 percent would be in those, you know, subdivision six schools ranging from 15 to 20 percent black. (A. 277a-280a)

On cross examination by respondents' counsel, Pettigrew said:

Q Well, do I understand you to say that your objection to a predominantly black school is that you view it as inferior or that the community may view it as inferior? A I would like to make the distinction between my view and what I view the community viewing. I think the community views, and not just in the south, and not just whites, predominantly black schools to be inferior. (A. 306a)

* * *

Q "Desegregation is a mere mix of bodies, black and white in the same school, preferably in some 20 to 40 percent or 45 percent black ratio." A Yes, sir. What I meant by preferably was, of course, that would up the possibility of getting the integration. (A. 309a)

* * *

Q . . . If you had a system which is set up in which each school in a metropolitan area has your optimal desegregation percentage between 20 and 40 percent black and the remainder white, would you advocate maintaining that ratio to maximize integration, as you understand it and as you have defined it throughout the system? A If we could manage it in every school in the metropolitan area, I would certainly advocate it.

Q Maintain that ratio? A Yes, sir, if it is possible. (A. 311a)

The notion that black majorities cannot provide a "viable acial mix" was underlined again by the testimony of Dr. Carmichael, the third of the petitioners' principal "expert" witnesses. He said, in plain terms, that a school is a "black" chool when the majority of students is black:

Q Now, coming for a moment to the proposition [D-50] placed by Mr. Gravatt that a child in the City of Richmond who is in a school situation in which the ratio is 65 percent black and 35 percent white, I believe you said that that ratio would give the child a sense of inferiority in that situation because the school would be identifiable as a black school, is that correct? A That is one of the feelings that I think you will have. (A. 397a)

* * *

Q So that in your opinion the Negro child is educationally in a better position if he is in a situation in which he is not in the majorty in the particular school

by race? A I think it is better if he is not. (A. 398a)

* * *

Q . . . But in any event, as you understand the plan, . . . the ratios which are established under it would be stabilized, that the percentages of Negroes would be maintained between 20 and 40 percent. And you were here during Dr. Little's testimony, were you? A Yes.

Q He said that if an urban development or a highway or throughway changed the character of a neighborhood, then adjustments would be made in the plan to keep the ratio at 20 to 40 percent? A Adjustments are not made in the plan. Adjustments are made in the method of assigning pupils to a given area within the plan.

Q In effect, I believe they would do it by computer and by lottery? A Right.

[D-61] Q So that under this plan from the time a Negro child is born until he finishes his educational career, indeed forever, he will always be computerized into a minority racial educational experience. Is that correct? A I have one reservation. You made it appear as if it is a 50-year kind of operation and the real point, I think, is that to begin and operate such a system in the immediate future, then that is correct.

Q Well, indefinitely, shall we put it, indefinitely under the plan, the child, the Negro child will always be? A First for either five or six years, depending upon what you put into the school, and then possibly for three years, depending upon what you put in the school, and then four years.

Q This is not what is envisioned under this plan? A Yes, it is.

Q This plan envisions, does it not, maintaining these ratios? A It envisions maintaining those ratios, yes, sir.

Q All right.

[D-62] Now, you said, Doctor that a 65 black ratio to white identifies a school and the child feels that he is in a racially identifiable school and this has a deleterious effect upon his learning experience.

Now, you say that if you change the ratio that that is not the case, that if it is a 65 percent white school and 35 percent black, he does not have this feeling. A I said that the school was not considered a black school and he does not have the feeling that he is in a black school which is an inferior school. (A. 403a-404a)

* * *

Q . . . Now, my question is, if that is true, then does it not follow that the ratio must always be maintained so that the Negro is in the majority situation?

[D-65] The Court: Majority?

The Witness: Minority.

By Mr. McIlwaine:

Q Minority, in the minority situation? A To deal with the present perceptions of what a school is and what is inferior and superior, that is true.

Q And this plan undertakes to see that that minority situation will be maintained? A For purposes of dealing with the existing problems, yes. (A. 406a)

The next "expert" witness, Dr. Lochran C. Nixon, Jr., ok the same position:

Q . . . You have referred to viable racial mixes as being essential to quality education. What do you mean by viable education mix? A You mean viable racial mix, Mr. Gravatt?

Q Racial mix, yes. A I support the definition that has been provided to us by the accumulating body

of research that has been used in testimony in Court and that is a high percentage somewhere in the range of 20 to 40 percent. (A. 439a)

* * *

That the judgment of the trial court rested on this "expertise" about the necessity for a "viable racial mix" is attested by the language of the trial court throughout its opinion. It is perhaps best epitomized by the following quotation from that opinion (338 F.Supp., at 194-195; Pet. A. 437a-439a):

> To achieve "integration," in Dr. Pettigrew's terms, one must have the "mix plus positive inter-action, as we would want to say, between whites and blacks." Current research indicates that in order to achieve these benefits there is an optimum racial composition which should be sought in each school. Dr. Pettigrew placed this at from 20 to 40% black occupancy. These figures are not at all hard and fast barriers, but merely indicate to the racial composition range in which inter-action of a positive sort is the more likely to occur.
>
> * * *
>
> Based upon projected enrollments under the current assignment plan for Richmond city schools, very few students will be in schools with a black population of 20 to 40%. At the elementary level, 3.04% of the black students and 9.43% of the white students will be in such schools. In middle schools 9.2% of blacks and 26.7% of whites will be in schools in that range. There will be no high school students in such schools.
>
> * * *
>
> If the Richmond metropolitan area consolidation plan were implemented, 97% of black students in the

area would attend schools in the range of 20-40% black; the remainder would be in 15-20% black schools. Under that plan 92.5% of the white students in the area would be in schools of the optimum mix determined by Dr. Pettigrew, and 7.5% would be in schools with a 15-20% black enrollment.

Thus was the goal established—the "viable racial mix" formula; the deficiency in the existing systems was established—the failure to accommodate to the "viable racial mix" formula; and the means of accomplishing the goal was established—a mandate to conform to the "viable racial mix" formula.

However far and fast the petitioners—and even the district court judge—may have attempted to run from the fact that the adopted plan rested exclusively on the theory of a "viable racial mix," the requirement of a white majority of between 60 and 80% wherever possible, the Court of Appeals for the Fourth Circuit recognized that the sole thesis supporting the plan was one that had clearly been forbidden by the decisions of this Court.

The Court of Appeals, sitting en banc, stated the issue in this manner (462 F.2d at 1060-1061; Pet. A. 562a-563a):

> May a United States District Judge compel one of the States of the Union to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools? We think not, absent invidious discrimination in the establishment or maintenance of local governmental units, and accordingly reverse.
>
> This is a new aspect of an old school case begun in 1961. Neither the parties to this appeal nor the numerous amici permitted to file briefs question the duty of the Richmond School Board to achieve a unitary school system. . . . Indeed, it is virtually conceded and

established beyond question that, albeit belatedly, Richmond has at this junction done all it can do to disestablish to the maximum extent possible the formerly state-imposed dual school system within its municipal boundary.

What is presented on appeal is whether the district court may compel joinder with Richmond's unitary school system two other school districts (also unitary) in order to achieve a greater degree of integration and racial balance. The district judge felt compelled to order consolidation of the three school units partly because of his concern with what seemed to him an unfortunate racial balance in the three separate systems and partly because he felt this racial balance was the result of invidious state action. In his concern for effective implementation of the Fourteenth Amendment he failed to sufficiently consider, we think, a fundamental principle of federalism incorporated in the Tenth Amendment and failed to consider that *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), established limitation on his power to fashion remedies in school cases.

G. The Role Of The State Board Of Education

No Power To Consolidate School Systems

Under the Constitution of Virginia of 1902 the State Board of Education had no authority to consolidate the schools or the school systems of the individual political subdivisions of Virginia. Section 132 of the Constitution of 1902 vested in the State Board of Education the authority to "divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions." Because Section 133 of that Constitution vested the supervision of schools in each county and city in the local school board, however, the inclusion of two localities within

one school division only had the effect of permitting one division superintendent to serve the two localities.[6]

Placing two localities in one school division did not invest the State Board of Education with the power to require a merger of the local schools or to direct the assignment of the pupils of one locality to the schools of the other locality within the division. Each county or city still retained its own independent school system which, by constitutional mandate, would be supervised by its own school board.

The effect of these constitutional provisions should have been abundantly clear to the district court by reference to cases which had come before it in which counties—joined into one division under the provisions of Section 132 of the Constitution for the purpose of sharing the same division superintendent—filed with the district court their separate, distinct and differing desegregation plans which that court approved in separate suits against each county.[7]

The foregoing limitations on the effect of the creation of divisions is made plain by Section 133 of the Constitution of 1902. In addition to vesting supervision of local schools in local school boards, that section also authorized the General Assembly to provide for the consolidation into one school

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[6] "There shall be oppointed by the school board or boards of each school division, one division superintendent of schools . . . ." Section 133, Constitution of 1902.

This device of including two localities within one school division for the purpose of permitting one division superintendent to serve both localities was utilized to allow small or poorer school divisions to share the cost of the division superintendent of schools.

[7] One such situation, which the district court could scarcely have forgotten, involved New Kent County and Charles City County both of which were included in the same school division. See, *Green* v. *School Board of New Kent County*, (E.D. Va. 1966), 382 F.2d 338 (4th Cir. 1967), rev'd. 391 U.S. 430 (1968), and *Bowman* v. *School Board of Charles City County*, (E.D. Va. 1966), 382 F.2d 326 (4th Cir. 1967).

division of two or more localities with the supervision of all schools in the localities being vested in a single school board. Pursuant to this authorization, the General Assembly, in 1954, enacted Va. Code §§ 22-100.1, et seq. Under those statutes, as they existed prior to their amendment in 1971, a multi-locality division with a single school board could only be established by the majority vote of the school board of each affected county and or city with the approval of the governing body of each affected locality and the approval of the State Board of Education. Such a school division has never been established in Virginia. It should be specifically noted that, prior to the order entered in this case on January 10, 1972, requiring such actions, neither the school boards of Richmond, Henrico or Chesterfield nor any of the governing bodies of those localities ever requested the State Board to take such action (462 F.2d, at 1067; Pet. A. 577a).

The Commission on Constitutional Revision[8] clearly recognized the status of Virginia law as described above in its report submitted January 1, 1969.[9] After reaching the

[8] The Commission was chaired by Albertis S. Harrison and included as its members Albert V. Bryan, Jr., George M. Cochran, Ted Dalton, Colgate W. Darden, Jr., Hardy C. Dillard, Alexander M. Harmon, Jr., Oliver W. Hill, J. Sloan Kuykendall, Davis Y. Paschall and Lewis F. Powell, Jr.

[9] On pages 205-206 of its report the Commission stated:

> "Under the present Constitution, a 'division' is an administrative unit to the extent that it is under the supervision of a single superintendent; otherwise the school system is divided into counties and cities, each of which has a separate school board and a separate fiscal structure. Under existing legislation, the State Board of Education may consolidate two or more counties, cities, or counties and cities, into a single school division, but they will remain separate fiscal units with separate school boards unless the affected governing bodies agree to establish a single school board. In practice no such agreement is ever reached, and efforts to persuade the General Assembly to effect fiscal consolidation of school divisions have never succeeded."

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conclusion that the then existing constitutional provisions did not authorize the State Board of Education to consolidate school divisions effectively, and believing that in the case of small divisions the State Board should have that authority, the Commission on Constitutional Revision recommended that the constitutional powers of the State Board regarding consolidation be amended to vest in the State Board full authority to consolidate independent political subdivisions into one school division for operational purposes. Had the Constitution been adopted as the Commission proposed, the law of Virginia would now confer upon the State Board the powers erroneously attributed to it by the petitioners and the district court.

In proposing the new Constitution and submitting it to the voters for ratification, however, the General Assembly significantly altered the provision suggested by the Commission. As proposed by the General Assembly and adopted by the people before the motion for joinder in this case was filed, the Constitution does not give the State Board of Education unfettered authority to establish, consolidate, or revise school divisions. On the contrary, as adopted, Section 5 of Article VIII of the Constitution of 1971 subjects the State Board's power to divide the Commonwealth into school divisions to "such criteria and conditions as the General Assembly may prescribe."

Following the adoption of the new Constitution, the General Assembly, at its extra session of 1971, provided for a legislative study commission to recommend criteria and conditions to be prescribed by the General Assembly. The General Assembly further provided that until the commission made its report, the State Board of Education, in dividing the State into school divisions, shall be governed by the following conditions which are set forth in Va. Code § 22-30:

(1) No school division shall be composed of more than one county or city;

(2) No school division shall be composed of a county or city and any one of the following towns: Abingdon, Cape Charles, Colonial Beach, Fries, Poquoson, Saltville, or West Point.

Notwithstanding any of the above criteria and conditions, the Board of Education may, upon the request of the school boards of the counties, cities, and towns affected, concurred in by the governing bodies thereof, consolidate or otherwise alter school divisions.

By providing that no school division shall contain more than one county or city, Va. Code § 22-30 has the effect of preserving the status created by Section 133 of the former Constitution that each county and city have its own school board. The exception to Va. Code § 22-30 allowing consolidation of two or more counties or cities into a single school division only upon the request of each local school board and the consent of each local governing body corresponds to Va. Code §§ 22-100.1 et seq. as it existed prior to its amendment in 1971. Thus Section 5 of Article VIII of the Constitution and Va. Code § 22-30 impose upon the State Board the same limitations regarding consolidation as did Sections 132 and 133 of the Constitution of 1902 and Va. Code §§ 22-100.1 et seq. prior to its amendment.

On June 25, 1971, acting pursuant to Va. Code § 22-30, the State Board divided the State into school divisions along the political subdivision boundary lines of each county and city, thereby constituting each county and city a separate school division with a separate school board. This action had no effect upon the school division boundaries of Richmond, Henrico, and Chesterfield. These school divisions, which have been separate divisions since at least 1871, were thus not "newly drawn" as asserted by the district court.

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The Court of Appeals summarized the Virginia law on this subject when it held:

> Thus neither under the old constitution and statutes in effect prior to July 1, 1971, nor under the new constitution and statutes in effect after that date, could the State Board of Education, acting alone, have effected the consolidation of the school systems of Richmond, Henrico and Chesterfield into a single system under the control of a single school board. (462 F.2d, at 1067; Pet. A. 577a-578a)

Division Of Powers Between The State Board Of Education And The Local School Boards

As previously noted, Section 133 of the Constitution of 1902 vested in the local school board the supervision of schools in its county or city. Similarly, Section 7 of Article VIII of the Constitution of 1971 vests the supervision of schools in each school division in the local school board. Thus, the day-to-day authority over the management and control of all public elementary and secondary schools is squarely placed on the local school boards.[10] As the Court of Appeals held, "The power to operate, maintain and supervise public schools in Virginia is, and has always been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education." (462 F.2d, at 1067; Pet. A. 576a)

Virginia's school boards differ from those in most states in their fiscal dependence upon their local governing bodies. The school boards have no authority whatever to levy taxes or appropriate funds for school purposes. The power to raise local funds to support the schools is within the exclusive jurisdiction of the local governing body. Thus, the school

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[10] See *San Antonio Independent School District* v. *Rodriguez*, ... U.S. ....., (Slip opinion page 47, fn. 108).

boards' annual operating budgets and requests for issuance of bonds for capital outlay must receive the approval of the local governing bodies (RX 69, p. 336). In Virginia school boards can only expend such funds as are made available to them from local, state and federal sources.[11]

In operating, maintaining and supervising the public schools committed to their charge, the local school boards make all essential decisions affecting their schools, thereby guaranteeing the greatest participation by those most directly concerned.[12] As recognized by the district court in an earlier phase of this case, the assignment of pupils is made by the local school board (317 F.Supp. 555, 563 (E.D. Va. 1970); Pet. A. 13a). Among other enumerable powers specifically vested in local school boards are: (1) the authority to provide for pupil transportation, Va. Code §§ 22-72.1, 22-97.1; (2) the authority to regulate pupil conduct, Va. Code §§ 22-72, 22-97, including the prerogative to suspend or expel for disciplinary reasons, Va. Code § 22-231; (3) the power to hire and terminate the employment of teachers and other personnel, Va. Code § 22-203, as well as the authority to specify conditions of their employment and their assignment in particular schools, Va. Code §§ 22-72, 22-97, 22-200; and (4) the authority to select textbooks for use in the division's schools, Va. Code § 22-318. Local school boards determine grading and pro-

[11] In the year 1969-1970, the local school divisions in Virginia received approximately 871 million dollars from local, state and federal sources for operation of public schools. Of this amount, 530 million emanated from the localities, 225 million were from direct appropriations by the General Assembly under a formula set out in the Appropriations Act, and 91 million came from federal sources. Only some 27 million (3%) was distributed under the rules and regulations of the State Board of Education. (Pet. A 267a; A. 927a-928a)

[12] See *San Antonio Independent School District* v. *Rodriguez*, ... U.S. ....., (Slip opinion page 47, fn. 108).

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motion policies,[13] and recreational and athletic policies. They also determine whether to operate night schools, Va. Code § 22-222.

The authority and power to select appropriate sites for school buildings is also vested in the local school board. No power exists anywhere in State government, or even in the people at large, to compel a local school board to build a school or locate it at any site other than that selected by the local school board. On two occasions the Virginia Supreme Court has specifically so held. *School Board of Carrol County* v. *Shockley*, 160 Va. 405, 168 S.E. 419 (1933); *Howard* v. *County School Board*, 203 Va. 55, 122 S.E.2d 891 (1961). Indeed, in *Howard*, after noting that Section 133 of the Constitution (now Section 7 of Article VIII of the Constitution) vests the supervision of schools in the local school board, the Supreme Court held, "In such supervision it is an essential function of the local board to determine whether a particular property is needed for school purposes and the manner in which it shall be used." 203 Va. at 58, 122 S.E.2d at 894. The power of eminent domain is vested in the local school board to insure that it is capable of obtaining the school sites of its choice, Va. Code § 25-232.

The only attempt by the General Assembly to centralize control of local public schools was resoundingly rebuffed by the Supreme Court of Virginia when it declared the "massive resistance" laws violative of the powers vested in local school boards under the Virginia Constitution. *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959). In that case, the Supreme Court of Virginia ruled on the question of intervention by the State Board of Education in the super-

[13] For example, Chesterfield, unlike Richmond or Henrico, has an ungraded pupil program in elementary schools in which a student is allowed to function at his individual level of ability in a given subject (A. 1018a-1021a).

vision and operation of local schools, 200 Va. at 452, 106 S.E. 2d at 646-47:

> Again, the Act . . . providing for the closing of schools because of integration, divesting local authorities of all power and control over them, and vesting such authority in the Governor, violates Section 133 [now Art. VIII, § 7] of the Constitution which vests the supervision of local schools in the local school boards.
>
> * * *
>
> Similarly, the Act . . . providing for the establishment and operation of a State school system to be administered by the Governor and under the supervision of the State Board of Education, violates Section 133.

Virginia's system of local control is similar to that described in *Smith* v. *North Carolina State Board of Education*, 444 F.2d 6 (4th Cir. 1971). There the district court ordered the State Board to participate in the preparation of desegregation plans for local school districts. Because the State Board had no control over the assignment of pupils, a matter completely under local control in North Carolina as in Virginia, the Court of Appeals vacated the district court's order requiring the State Board to participate in the formulation of such plans.

In *San Antonio School District* v. *Rodriguez*, ... U.S. ..... (No. 71-1332, decided March 21, 1973), this Court after a review of the powers vested by Texas law in local school boards, declared that Texas education was "largely a local function." It cannot be doubted that in Virginia, where the Constitution and statutes vest the power to operate, maintain and supervise public schools within the exclusive jurisdiction of the local school boards, that education is also largely a local function subject to local control. (Slip opinion page 47, fn. 108)

H. Demography

The district court heard much testimony concerning the effect of governmental actions and the use of racial covenants on the demographic distribution of the Richmond Standard Metropolitan Statistical Area (SMSA).

The record, however, reveals no governmental action by the State or County defendants that has had any substantial impact on the residential patterns in the counties. To the contrary, the zoning laws, building restrictions and license requirements in both counties are less restrictive than those of the city (A. 168a, 176a, 860a, 886a, 1276a). Indeed, a witness for the plaintiffs testified than an independent study of the administration of the zoning laws in the Richmond SMSA disclosed "no evidence to support [racially] discriminatory zoning practices whatsoever" (A. 503a).

The development of suburbia in Henrico and Chesterfield occurred after the period when racial covenants could have affected demographic patterns anywhere in the nation. It was following 1950 that each of the two counties experienced their periods of greatest growth (Ex. A. 8e). During that period, not only were racial covenants unenforceable as a matter of law, but, subsequent to 1950 they were rarely inserted in deeds in the two counties (Ex. A. 117e-123e, 133e-144e). No suit to enforce a racial covenant in either county at any time was disclosed by the evidence, and there was uncontradicted positive evidence that no such suit had been filed since 1936 in Henrico and 1938 in Chesterfield (Ex. A. 94e, 95e, 127e).

The population of Henrico County increased by only about 15,000 in the 1940's, but grew by 97,000 in the period 1950 to 1970. Thus, 63% of Henrico's 1970 population was gained since 1950 (Ex. A. 8e).

In Chesterfield County, as it was prior to the 1970 annexation, the population increased by only 9,000 in the 1940's, but increased by 81,000 between 1950 and 1970. Thus, 66% of the 1970 population in this area was gained since 1950 (Ex. A. 8e).

The movement of population to the suburbs in the Richmond SMSA is a repetition here of a phenomenon observable across the nation (A. 630a, 643a, 650a, 1073a; Ex. A. 124e- 125e). As the plaintiff's own witness, Dr. Karl Taeuber, "an expert witness and noted demographer"[14] repeatedly testified:

> Q Was Richmond, Virginia, one of the cities included in the study? A Yes, it is.
>
> Q What were the general findings of your study, sir, with reference to segregation indexes, residential segregation indexes of the cities? A We found by examining these indexes, using data from 1960 census, the corresponding data from the 1970 census, are only now beginning to be published. We found a residential segregation of the races was very pronounced, was [1-11] pervasive throughout the United States. That this pattern occurred in cities in all regions. It occurred in cities of all types, whether manufacturing cities or retail trade centers, whatever the character of the city. (A. 630a)
>
> * * *
>
> Q Dr. Taeuber, did I understand you to testify that the racial distribution in the City of Richmond generally conforms to the pattern of racial distribution in all of the large cities of the United States without regard to what type of city it may be? A Yes. (A. 643a)
>
> * * *

[14] Brief for Petitioners in No. 72-550, p. 32.

Q Now, what has been the trend of population movement, generally, throughout the United States from approximately 1948 up until after the 1960 census with respect to movement of population into or out of the central city? A There has been a continued movement of people in a very complex pattern whose net result is a very rapid growth of the suburban areas and a relative stability of the city areas.

Q So that what has happened in the City of Richmond with relation to Henrico and Chesterfield County is characteristic of what has happened generally throughout [I-33] the metropolitan areas of the United States, is that true? A In a very general way, yes.

Q Well, isn't it a fact that almost uniformly the white population generally, those who could afford it, have moved out of the central city and into the countryside and developed the countryside into suburban areas during the last 30 years from 1940 up until the present? A This is a general proposition, but it seems more true generally than precisely of Richmond in terms of the data I have looked at.

Q What do you mean by that? A In the sense that the white population of Richmond has not declined as it has in large numbers of other cities so that the characterization of large numbers of whites moving out of the city to the suburbs may not apply in quite the same way.

* * *

[I-34] Q But the City of Richmond white population has maintained stability? A It has increased some, yes, sir. (A. 643a-644a)

* * *

Q Well, did you calculate for the 200 cities that you did use the same index? A Yes.

Q For each of them? A Yes.

Q And would this be a true statement of your results that you found "Almost all of the cities studied

> were more than 70 percent and many were in the 80's or 90's, that this demonstrated that racial residential segregation is not unique to one city or one type of city but is a common pattern among American cities. It prevails in the north and in the south, among industrial cities, among resort cities, university towns, large cities, smaller cities, in effect it was a universal pattern"? A Yes. (A. 650a)

Contrary to popular belief and even to the surprise of the Richmond City Planner (A. 179a-180a), the net in-migration of blacks to the City of Richmond has been negligible (0.8%). During the decade 1960-1970, despite an increase in the black population in the city of 13,433, the net in-migration accounted for only 782 of that gain, or an average gain of 78 blacks per year (A. 651a). It is clear, therefore, that the increase in the black population is not the result of movement out of the adjoining counties by black citizens. The net in-migration of whites to the city, including those acquired by annexation, exceed that of blacks, totalling approximately 16,000 (A. 654a).

The construction and location of schools in the counties has followed, rather than precipitated, residential growth in the counties. In every case, schools built in the counties were needed to alleviate existing overcrowding and new schools were substantially filled as soon as they were completed (A. 978a-980a, 981a, 1000a).

In light of the foregoing, the Court of Appeals could not do otherwise than conclude (462 F.2d, at 1066; Pet. A. 574a-575a):

> We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of

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Richmond. We are convinced that what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been invidious state action which has resulted in the racial composition of the three school districts. Indeed this record warrants no other conclusion than that the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result. Typical of all of these cities is a growing black population in the central city and a growing white population in the surrounding suburban and rural areas. Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend.

I. *Conclusion.*

The Court of Appeals concluded:

> Because we think the last vestiges of state-imposed segregation have been wiped out in the public schools of the City of Richmond and the Counties of Henrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action, we conclude that there is no constitutional violation and that, therefore, the district court exceeded his power of intervention. (462 F.2d at 1070; Pet. A. 582a-583a).

In sum, the essential facts that should engage this Court's attention are these:

1. The school systems in the City of Richmond, and the Counties of Henrico and Chesterfield are unitary systems.

2. The three school systems are integral parts of the city and county governments upon which they are dependent for financing and are not separate, fiscally independent school districts.

3. The boundaries of the city and counties were not created nor have they been manipulated to further segregation or to prevent desegregation of any of the school systems.

4. The demographic changes in the Richmond area are duplicative of those that have taken place throughout the nation.

5. The sole purpose and effect of the plan struck down by the Fourth Circuit was to assure substantial white majorities for children attending the Richmond schools.

SUMMARY OF ARGUMENT

The sole issue in this case is whether the Constitution compels the consolidation of three unitary school systems in order to effect a "viable racial mix," *i.e.*, a white majority in every school of not less than 60% nor more than 80%. This is not a busing case; it is a racial balance case.

I. There must be a constitutional violation to justify the substitution of federal judicial power for the legitimate authority of the state and local governments in the area of education. *Swann* v. *Board of Education*, 402 U.S. 1 (1971). There is no constitutional violation to afford a predicate for judicial action here.

A. All three school systems involved in this case are unitary systems that are in compliance with the requirements of the Constitution and federal statutory law. The function of judicial intervention in "desegregation cases" is only to dismantle a dual system and establish one which

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is unitary. *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann*, 402 U.S. at 31-32. That result has already been accomplished in each of the three systems involved here.

B. There is no constitutional violation on which to base the decree of the trial court in this case.

1. Absence of a "viable racial mix" is not a constitutional violation. *Swann*, 402 U.S. at 16, 24. Indeed, the requirement of a "viable racial mix" would be itself unconstitutional. *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, South Carolina*, 429 F.2d 820, 824, 826 (4th Cir. 1970).

2. The demography of the Richmond SMSA, which is typical of the national pattern of concentration of blacks in the central city and whites in the surrounding areas, does not constitute a constitutional violation. There is no showing here "that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." *Swann*, 402 U.S. at 32.

3. The history of segregation in Virginia does not reveal a constitutional violation to be abated by judicial action here. There is no nexus between any of the past wrongs and the alleged need for a racially balanced consolidated school system. A plan to effect a "viable racial mix" would itself be a throwback to the kind of segregation by race that *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Green*, and *Swann* have condemned. The district court judgment would, indeed, turn back the clock to that period of Virginia history that Virginia itself has now clearly rejected. Virginia's "original sin" cannot justify the trial court's judgment. *Swann*, 402 U.S. at 31-32.

4. The failure of the State Board of Education to compel the consolidation of the three school systems is not a constitutional violation. The State Board has no power to effect such a consolidation. *Bradley*, 462 F.2d at 1067. It should not do so if it could, since the only justification for such consolidation is to effect a "viable racial mix," which is at least constitutionally suspect. There has been no "white flight" from the city schools to the county schools; nor was there any impropriety in the siting of schools in the counties. There is no obligation of the State to effect a "racially balanced" school system, *Swann*, 402 U.S. at 16, much less to consolidate three unitary systems in order to effectuate such a racial mix.

5. Failure of the respondents to offer a consolidation plan is not a constitutional violation. *Swann*, 402 U.S. at 16.

6. This Court must not say that black majority schools are intrinsically inferior or that black majority schools impose a feeling of inferiority on those black students who attend them. Were it to do so, this Court would have to reject the elemental holding of equality of the races in *Brown*. It would also require the reversal of its holdings in *Swann* and *Emporia*, that racial balance even within a single school system is not a constitutional requirement. *Swann*, 402 U.S. at 24; *Wright* v. *City Council of Emporia*, 407 U.S. 451, 464 (1972).

II. The judicial "remedy" of consolidating three unitary school systems in order to effect a "viable racial mix" among them is both improper and invalid. The "nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16. Since there was no constitutional violation here, there is no basis whatsoever for a "remedy." "Disparity in

the racial composition of the . . . systems would [not] be a sufficient reason," standing alone to mandate the creation of the consolidated school system. *Emporia*, 407 U.S. at 464.

All relevant factors to be considered in determining the propriety of federal court intervention to restructure state government weigh against the action of the trial court here.

There is here no "white flight" from the city schools to the county schools; there is no difference in quality between the city schools and the county schools; the timing of the trial court's proposal for gerrymander, immediately after Richmond reached unitary status; all of these factors read against approval of the decree. *Emporia*, 407 U.S. at 464-65.

The proposed decree would invalidly destroy local control over the most essential function of local government education. *Emporia*, 407 U.S. 469, 478; *San Antonio School District* v. *Rodriguez*, No. 71-1332, decided 21 March, 1973, slip opinion at pp. 45-46. The restructuring of local governmental units to effect a "viable racial mix" is beyond the scope of federal judicial power. *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D.N.J. 1971) aff'd, 404 U.S. 1027 (1972); *Emporia*, 407 U.S. at 471-72; *San Antonio School Dstrict*, *supra*. Such a consolidation decree as the trial court ordered here would invalidly separate the school systems from their local financial support that is vital to local educational systems. *San Antonio School District*, at p. 36.

There is no precedent for restructuring local government units except where those governmental units have been either created or altered to effect an unconstitutional end. *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); *Mahan* v. *Howell*, Nos. 71-6364, 71-373, 71-444, decided 21 February, 1973.

The proposed consolidation commands, as such a plan must, massive racially segregated busing, with the pupils selected on the basis of a draft lottery. Such segregated

busing would exacerbate racial differences rather than ameliorate them.

The consolidated system would transmute three school systems of optimum size into one huge, unwieldy, educationally undesirable system, with three separate tax bases, that would rank in size among the top 0.2% of all school systems in the United States.

The decree combining these three unitary school systems in order to effect a "viable racial mix" would create a precedent for dismantling all desegregated unitary systems that lacked a white majority. Where there are no contiguous school systems to provide white pupils to accomplish this result, there could be no judicial remedy, leaving such black majority school systems with this Court's stamp of inferiority. As this Court said in *Swann:*

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits." (402 U.S. at 28) Clearly, the district court decree goes beyond these limits.

ARGUMENT

I.

There Is No Constitutional Violation That Affords Any Basis For The Restructuring Of Local Government Ordered By The District Court.

This Court made it abundantly clear in *Swann* v. *Board of Education*, 402 U.S. 1 (1971), that before the federal judiciary can intervene in local school affairs the existence of a constitutional violation must be established by way of predicate for its action.

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only

> on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults. (402 U.S. at 16.)

Neither the petitioners nor the trial court have demonstrated any predicate of constitutional violation on which the trial court's action can be rested.

A.

THERE IS NO DUAL SYSTEM TO BE ABATED BY JUDICIAL ACTION

The mandate of this Court to the lower federal courts has been clear: every dual school system must be converted into a unitary system to meet the requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), as explicated in *Green* v. *County School Board*, 391 U.S. 430 (1968), and in *Swann*, *supra*. As this Court said, in *Green*:

> It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about: . . . (391 U.S. at 435-36.)

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. . . . In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. . . . *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts. (391 U.S. at 437-38.)

The deficiency in the New Kent County "freedom-of-choice" plan was that it did not convert a dual school system into a unitary school system. "Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board." (391 U.S. at 441-42.)

The emphasis on reform of "school systems" from dual to unitary and the emphasis on the obligation of the particular school board in charge of such a system was repeated in *Swann*.

The three distinct school systems involved in this case are no longer dual systems; each is a unitary system. Fur-

ther interference by federal district courts is neither warranted nor permitted. As this Court said in *Swann:*

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. (402 U.S. at 31-32.)

There is no real quarrel that each of the three school systems is in fact "unitary." The Court of Appeals for the Fourth Circuit so held. (462 F.2d at 1061; Pet. A. 563a.) So far as Richmond is concerned, the trial court itself so held when it approved Plan III which is currently in effect in Richmond. The court had previously approved an alternative plan—the Foster Plan—for which Plan III was substituted. As to the Foster Plan, the District Court had said:

> The Court therefore concludes:
>
> 1. That compliance with the law of the land can be reasonably effected by the adoption of a reasonable degree of transportation.

2. That the plaintiffs' plan would, if adopted, create a unitary system.

3. That transportation is an acceptable tool in effectuating a unitary system of schools.

4. That while racial balance is not required in each and every school in the system, there is no intractible remnant of segregation in the City of Richmond school system since all parts of the city can be reached by virtue of reasonable amounts of transportation, both as to distances, times and sums involved.

The Court further finds that the adoption of a plan such as suggested by Dr. Foster may well not only create a unitary system, but do much toward the thwarting of resegregation of schools once the unitary system has been put into effect. (*Bradley* v. *School Board of City of Richmond, Va.*, 317 F.Supp. 555, 576 (E.D. Va., 1970).)

Of Plan III, formulated by the City of Richmond as a substitute for the Foster Plan which had been offered by the plaintiffs in the action, the trial court said:

. . . Because upon examination the Court cannot find that the Foster plan would result in a "more unitary" system at any level, the adoption of plan 3 can be approved. (*Bradley* v. *School Board of City of Richmond, Va.*, 325 F.Supp. 828, 844 (E.D. Va. 1971).)

. . . Although operation under either plan would fulfill the School Board's legal duty, it would be fully justified in prefering plan 3 on the basis of whatever administrative or educational reasons it finds persuasive. (*Id.* at 846.)

Nor is there any doubt that the Counties of Henrico and Chesterfield are in compliance with the constitutional requirements to establish unitary school systems in place of the dual school systems which they once administered. (See pp. 8-12, *supra*.)

Dr. Pettigrew so testified:

> Q . . . If you will exclude from your discussion the Matoaca Laboratory School about which there will be [C-114] some further discussion later, if you will exclude that, is there any black child in Richmond, Chesterfield, or Henrico, who is not in a desegregated school? A Any black child? In the sense of pure mix, simple mix?
>
> Q That is all I am talking about, Doctor, the terms that you used, desegregated? A Then black children are in—
>
> Q All are in desegregated schools? A Yes. (A. 321a-322a).

The uncontradicted evidence is plentiful that the counties of Henrico and Chesterfield were each in compliance with the requirements of the Constitution and HEW to create and maintain unitary school systems. The one point of exception taken went to the Matoaca Laboratory School geographically located in Chesterfield County.

The Matoaca Laboratory School, of which the petitioners would make so much, as evidence of the failure of Chesterfield to desegregate is an example of the Procrustean bed into which they would place the school boards of the nation. Matoaca Laboratory School is owned and operated as a part of the Virginia State College, a predominantly black college. There is no question that the Laboratory School is a superior education facility, used both as a laboratory for the teacher education program at the college and as an incentive to teachers with school-age children to join the faculty of the college. The students at the Laboratory School have always been selected by the college. Chesterfield County afforded incidental services to the school, such as transportation for students, and acted as a conduit for

ADA (average daily attendance) funds paid by the State to all public schools. Chesterfield County had no control or influence over the choice of students or the content of the educational program or the selection of faculty. After the trial judge brought the counties of Chesterfield and Henrico into the Richmond desegregation case, Chesterfield received a letter from HEW saying that the continuance of its assistance to Matoaca Laboratory School was inconsistent with the requirements of a unitary school system which Chesterfield was otherwise maintaining. Upon receipt of the HEW objection, the Chesterfield School Board informed Virginia State College that the county could no longer participate in the operation of the school and the connection was severed by mutual agreement (A. 1021a-1024a). That action satisfied the requirement of HEW.

It is thus patent that the three school systems of Richmond, Henrico, and Chesterfield were each in compliance with the constitutional requirement that they establish unitary systems. Indeed, as the plaintiffs-petitioners have put the matter in their brief:

> That brings us to the one major point on which the Court of Appeals and the District Court were thoroughly agreed: that, within the boundary lines of the three school divisions, nothing more can be done than has already been done to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis*, 402 U.S., at 37. (Brief for Petitioners, in No. 72-550, at p. 66.)

Richmond and Chesterfield and Henrico are all in compliance with the constitutional mandate to each of the respective school systems to eliminate dual systems and establish unitary ones. Petitioners now seek to establish new standards and obligations beyond those commanded by the courts in order to establish a principle, not of de-

segregation of schools, but of racial balance, not merely within separate school systems but among them.

B.

THE THREE SCHOOL SYSTEMS ARE IN FULL COMPLIANCE WITH THE CONSTITUTIONAL MANDATE AND THERE IN NO CONSTITUTIONAL VIOLATION ON WHICH TO PREDICATE JUDICIAL REFORMULATION OF THE THREE UNITARY SCHOOL SSYTEMS.

In *Swann*, this Court said:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. (402 U.S. at 24.)

The consolidation plan approved by the district court commands not merely racial balance within a school system but among the schools of all three systems. Whatever rationalization is offered to support it, there can be no doubt that the deficiency to be cured, as seen by the petitioners and the trial court, is that the racial balance in Richmond schools is different from the racial balance in the schools of the adjacent counties. It is this racial imbalance that the petitioners seek to redress. The sole objective and effect of the plan is to impose the same racial balance on the school systems of Chesterfield, Henrico and Richmond—to make "every school" in each separate school system, "reflect the racial composition" of the three systems "as a whole." Because no justification exists for such action, under any decision of this Court, the petitioners have sought to invent

a new Constitutional violation and have offered a variety of arguments to support the objective, no one of which is adequate by itself and no combination of them is any better.

1. *The absence of a "viable racial mix" is not a Constitutional violation.* The totality of the argument offered in support of the Richmond consolidation plan at the trial—although based on evidence which the petitioners would now abandon, for good cause—rests on the proposition that a black majority school system, or any school system that has less than 20% or more than 40% blacks, is "segregated." There can be no question that this was the thesis on which the plan was offered by its proponents and embraced by the district court. The quotations set out above—only a small portion of those in the record—make this clear. (See pp. 18-31 *supra.*)

Even within a single school system which has attained unitary status, as Richmond and Chesterfield and Henrico have done, the requirement of attaining racial balance in all schools reflecting the racial balance within the system, would be invalid. Thus, this Court said in *Swann:*

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.* As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad

> power to fashion a remedy that will assure a unitary school system. (402 U.S. at 16.) (Emphasis added.)

Not only have the Richmond school authorities established a unitary system for the operation of the Richmond schools which is now in effect, Plan III, but the plaintiffs-petitioners had previously produced—and the trial court had approved —a unitary system, the Foster Plan, which would also have eliminated the dual school system within Richmond.

A fortiori, the Pettigrew thesis, as it has become known in the Fourth Circuit where Dr. Pettigrew has unsuccessfully peddled it for several years as a judicial tool is, as such, invalid interference with the school authorities' broad power to formulate and implement educational policy. As applied in this case, the thesis goes even beyond the notion of racial balancing within a school system. Here, the thesis would require reaching out to borrow for its purposes the children of adjacent school systems, and it would also require white majorities of not less than 60% nor more than 80% in all schools. The basis for the theory, as Dr. Carmichael, the Richmond School Board's witness, acknowledged, "is that in America we can't make a system work if it is majority black." (A. 412a)

The reasons why this notion of majority white student bodies—the kind that the consolidated school plan seeks to attain—is invalid were cogently stated by Judge Sobeloff in his concurring opinion in *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, South Carolina*, 429 F.2d 820, 824, 826 (C.A. 4th, 1970):

> The linch-pin of the dissent is the notion that, ideally, the goal of desegregation should be to achieve an "optimal mix," consisting of a white majority. It suggests, as did Dr. Pettigrew in his testimony in *Brewer* v. *School Board of City of Norfolk* (434 F.2d 408) (4th

Cir. 1970), that desegregation should not go so far as to put whites in minority situations. In *Brewer* we gave short shrift to the Board "principles" fashioned largely from Dr. Pettigrew's testimony. Summary treatment is all it deserved.

* * *

Since the dissent has seen fit in this case to revive the spectre of the Pettigrew thesis, previously cast aside, I cannot let the matter pass without comment. This is no mere issue of expert testimony. It is no mere question of "sociology and educational theory." There have always been those who believed that segregation of the races in the schools was sound educational policy, but since *Brown* their reasoning has not been permitted to withstand the constitutional command. When the underpinnings of the white majority proposal are exposed, they seem to constitute a direct attack on the roots of the *Brown* decision. The minority's readiness even to entertain the idea reflects, I respectfully submit, a profound misunderstanding of the social and constitutional history of this nation and the Negro people.

* * *

The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of "socio-economic class" and the necessity for the creation of a "middle-class milieu," nevertheless, at bottom, it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils.

* * *

. . . But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive.

> This is the precise lesson of *Brown*. Were a court to adopt the Pettigrew rationale it would do explicitly what compulsory segregation laws did implicitly.

Certainly it behooves this Court not to put its imprimatur n what Judge Sobeloff so roundly and so rightly con-emned as a reversal of *Brown* and all that *Brown* stands or.

2. *Concentrations of blacks in cities and whites in sub-rbs is a national phenomenon which, of itself, cannot consti-ute a constitutional violation.* The weakness of the consti-utional argument for the creation of a "viable racial mix," e., white-majority schools, became patent to the petitioners y the time the trial ended. As a result, they have made very effort to suggest that the racial "imbalance" between he suburbs and the city of Richmond must be due to some ther form of constitutional violation. The argument from emography, like all of their arguments that have followed he abandonment of the advocacy of "viable racial mix," is rcular. Essentially, the argument boils down to the propo-tion that there is a disparity between the racial mix of the opulation within and without the city, therefore the dif-erence is a violation of the constitution. But there is no vidence in this record—and, indeed, there can be no evi-ence—to support the proposition that the racial imbalance etween city and suburbs resulted in any way from actions f the respondents. Without such a nexus, of course, there no showing of a constitutional violation on which to redicate the kind of "remedy" that the district court would npose here. The requirement of such a nexus was clearly ated by this Court in *Swann*, when it said: ". . . in the bsence of a showing that either the school authorities or me other agency of the State has deliberately attemped fix or alter demographic patterns to affect the racial

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2. *Concentrations of blacks in cities and whites in suburbs is a national phenomenon which, of itself, cannot constitute a constitutional violation.* The weakness of the constitutional argument for the creation of a "viable racial mix," *i.e.*, white-majority schools, became patent to the petitioners by the time the trial ended. As a result, they have made every effort to suggest that the racial "imbalance" between the suburbs and the city of Richmond must be due to some other form of constitutional violation. The argument from demography, like all of their arguments that have followed the abandonment of the advocacy of "viable racial mix," is circular. Essentially, the argument boils down to the proposition that there is a disparity between the racial mix of the population within and without the city, therefore the difference is a violation of the constitution. But there is no evidence in this record—and, indeed, there can be no evidence—to support the proposition that the racial imbalance between city and suburbs resulted in any way from actions of the respondents. Without such a nexus, of course, there is no showing of a constitutional violation on which to predicate the kind of "remedy" that the district court would impose here. The requirement of such a nexus was clearly stated by this Court in *Swann*, when it said: ". . . in the absence of a showing that either the school authorities or some other agency of the State has deliberately attemped to fix or alter demographic patterns to affect the racial

composition of the schools, further intervention by a district court should not be necessary." (402 U.S. at 32).

a. The Richmond area demography. The fact of the matter is that the growth of suburbs with predominantly white populations and the increase in the proportion of black populations in the central cities is a nationwide phenomenon, totally independent of the area in which the city is located, totally independent of the history of segregation of schools. A simple glance at the Census Bureau statistics on Standard Metropolitan Statistical Areas (SMSAs) reveals the same racial disparities of the city-suburb populations in the North, East, and West as in the Southern States with segregationist histories. They also show that, if anything, the City of Richmond SMSA has experienced less movement toward central city black concentration and suburban white concentration than other SMSAs across the nation. It is impossible to predicate a constitutional violation on the basic fact of racial imbalance between the suburban communities and the central city community.

The data in the accompanying chart is taken from The Statistical Abstract of the U.S., prepared by the Bureau of the Census, U.S. Department of Commerce. These data are to be found in Section 33, pp. 838-39, 858-59, 878-79, of the commercially published edition of The Statistical Abstract which bears the title: *The American Almanac* and is published by Grosset & Dunlap. The Richmond SMSA ranks 65th in population among the SMSAs. The table contains the relevant statistics about the SMSAs that rank from 55th to 75th in population. The data in columns 1, 2 and 4 are taken directly from the Statistical Abstract; column 3 was secured simply by subtracting the white growth rate in the central cities in these SMSAs from the black growth rate in those same cities.

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1960-1970	SMSA 1	Central City 2			3	4	
	% SMSA Growth	% Growth Central City			Black > White % Growth	% Net In-Migration	
		W	B	Tot.		B	W
Allentown, Pa. (544,000)	10.4	—2.8	83.5	—1.5	86.3	(NA)	(NA)
Charlotte, N.C. (409,000)	29.2	15.3	30.3	19.7	15.0	5.9	1.9
Flint, Mich. (497,000)	19.3	—14.8	58.7	—1.8	73.5	10.2	—46.8
Fresno, Calif. (413,000)	12.9	19.1	68.4	23.9	47.3	5.4	9.8
Grand Rapids, Mich. (539,000)	16.7	7.1	59.9	11.5	52.8	4.1	—7.4
Greensboro, N.C. (604,000)	16.1	14.2	21.3	16.1	7.1	3.3	5.0
Harrisburg, Pa. (411,000)	10.5	—27.5	40.2	—14.6	67.7	(NA)	(NA)
Jacksonville, Fla. (529,000)	16.1	16.8	13.9	16.1	—2.9	—3.9	5.3
Jersey City, N.J. (609,000)	—0.2	—15.1	54.9	—5.6	70	7.1	—46.1
Knoxville, Tenn. (400,000)	8.8	66.9	9.0	56.1	—57.9	(Z)	48.9
Nashville, Tenn. (541,000)	16.7	11.1	16.1	12.1	5.0	2.4	—1.9
Omaha, Neb. (540,000)	18.0	12.8	39.8	15.2	27.0	2.6	—2.4
Orlando, Fla. (428,000)	34.4	3.1	42.5	12.3	39.4	3.3	—4.1
Salt Lake City, Utah (558,000)	24.5	—8.2	42.0	—7.2	50.2	(NA)	(NA)
Springfield, Mass. (530,000)	7.3	—6.3	63.2	—2.8	69.5	(NA)	(NA)
Tacoma, Wash. (411,000)	27.8	0.1	81.4	4.5	81.3	(NA)	(NA)
Tulsa, Okla. (477,000)	13.8	21.8	71.1	26.7	49.3	12.1	23.9
Wichita, Kan. (389,000)	17.3	5.7	39.9	8.6	34.2	1.7	—21.5
Wilmington, Del. (499,000)	20.5	—36.5	41.5	—16.1	78.0	5.0	—26.4
Youngstown, Ohio (536,000)	5.3	—15.6	15.9	—10.2	31.5	0.8	—39.0
Richmond (538,000)	**18.9**	**12.7**	**14.5**	**13.5**	**1.8**	**0.8**	**14.3**

(NA) = Not available (Z) = Less than 500 total

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These data reveal that, except for Jacksonville, Florida, and Knoxville, Tennessee, all 21 central cities have a substantially greater black growth rate than white growth rate. The highest disparities are in Allentown, Pa., Flint, Mich., Harrisburg, Pa., Springfield, Mass., Tacoma, Wash., and Wilmington, Del. For the most part, the differences in the growth rate are not attributable to migration. And, most important perhaps, both on an absolute and a comparative scale, the City of Richmond shows only a slight difference between the black and white growth rates: 14.5% black and 12.7% white and a large white in-migration, attributable largely to an annexation, 14.3%, and almost no black in-migration, 0.8%.

What is true of these SMSAs with populations between 389,000 and 609,000 is true of the SMSAs of the nation as a whole as another chart derived from the Census Bureau attests:

SUMMARY TOTALS FOR THE 66 SMSAs
(In thousands)

	Total SMSA	Central Cities	Ring
Total Population: 1970	110,909	53,550	57,359
White Population: 1970	93,915	39,817	54,093
Change: 1960 to 1970			
Number	9,927	—2,538	12,468
Percent	11.8	—6.0	30.0
Negro Population: 1970	15,064	12,487	3,577
Change: 1960 to 1970			
Number	4,149	3,390	762
Percent	38.0	37.3	42.0
Percent Negro:			
1970	13.6	23.3	6.5
1960	11.5	17.7	4.2

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The overall national trend that is reflected in these figures was conceded by petitioners' witnesses during the course of the trial. Mr. A. Howe Todd, Director of Planning and Community Development for the City of Richmond, the petitioners' expert on this matter testified:

> Q You have made a study of the census of the major metropolitan statistical areas for the United States in 1960 and 1970, haven't you? A I used it, yes, sir.
>
> Q Well, isn't the same thing happening all over the country to major cities as is happening to Richmond as to loss and gain of population? A I don't see any great difference. In fact, I said in my testimony that Richmond metropolitan area has the same problems and is growing and developing similarly to other metropolitan areas. (A. 173a)

Dr. Karl E. Taeuber, the petitioners' other major expert witness on demographic distribution, testified:

> Q Dr. Taeuber, did I understand you to testify that the racial distribution in the City of Richmond generally conforms to the pattern of racial distribution in all of the large cities of the United States without regard to what type of city it may be? A Yes. (A. 643a)

b. *Housing.* Nonetheless, petitioners assert that zoning practices, restrictive covenants, and housing regulations are the basis for the Richmond area racial imbalance between the city and the suburbs. But the facts of record are inconsistent with a demonstration of any such nexus.

On zoning, the petitioners' witness, Mr. Todd, testified that he could not "think of any zoning practices" in the areas around Richmond that had any "effect of containing black areas" or "encircling them" or "locking them off from

white areas of residence." (A. 168a) As to subdivision practices, of the five or six hundred plans filed each year, he could recall generally only "three or four times . . . in 20 years" that proposals were made to preclude access to new developments from black communities. (A. 169a) As a matter of fact, the only such practice that he specifically recalled "was in the 50's." (A. 168a) If anything, zoning practices encouraged movement from the city to the suburbs, as this same witness testified:

> Q Could you tell me, sir, whether the zoning laws in the City of Richmond with respect to residential development are more or less restrictive than the laws of Chesterfield County? A I haven't made a study of that, Mr. Gray. I am not sure I can answer. I understand Chesterfield has a recently developed new subdivision regulation which I haven't seen.
>
> Q Well, are you familiar with the old one? A Only in a very, very general way, yes, sir.
> I have seen what came in after annexation, and I did try to compare ours.
>
> Q Do you know generally whether they are more or less restrictive than Richmond? A I would say less restrictive. (A. 176a)

* * *

The plaintiffs' witness, Mr. Edward George Councill, III, the Executive Director of the Richmond Regional Planning District Commission, on direct examination, testified on the basis of a report offered to support petitioners' case:

> Q . . . Does that study have any opinion as to the administration of zoning ordinances in this area? A It has a major opinion.
>
> Q Tell us what that is. A It has found that in the jurisdiction which makes [F-36] up the standard metropolitan area, Richmond, Henrico, and Chester-

field and Hanover, no evidence to support discriminatory zoning practices whatsoever.

Q In all four jurisdictions? A All four jurisdictions studied. (A. 503a)

There is absolutely nothing in the record to contradict these conclusions. There is additional evidence to support them.

As to restrictive covenants, the evidence is equally clear that they in no way affected the racial balance between the city and suburban communities. The growth of the suburbs occurred, as Richmond's Exhibit 57a (Ex. A. 8e) reveals, after 1950. The case of *Shelley* v. *Kraemer*, 334 U.S. 1, was decided in 1948. Witnesses could recall not a single suit maintained on a restrictive covenant in Chesterfield or Henrico. (CX 19, Ex. A. 127e; HX 17, 18, Ex. A. 94e-95e) There is no evidence in the record to show in any way that any racial covenant was ever utilized as a means of preventing the movement of blacks into Chesterfield or Henrico or out of Richmond. The evidence relating to restrictive covenants challenges actions of the national government, not state or local governments. Indeed, the sole evidence suggesting that any governmental policy or action made any contribution to the racial imbalance of suburbs and central cities is evidence of the failure of the national government to implement the decision in *Shelley* v. *Kraemer*.

Dr. Pettigrew testified that the responsibility for racial segregation in housing was attributable not to state or local governments but to the deficiencies of national policy:

A . . . the chief reason why we have housing segregation in the United States by race is federal policy. Federal policies from the initial housing act in 1935 are what basically segregated by race. There are other things that contributed to it, to be sure, including racial

discrimination and so forth in the real estate industry, but we need to change federal policy.

. . . The federal government, in effect, gave lower interest terms if you built, if whites built a home in the suburbs. They discriminated, the Veterans Administration and FHA did against, as has been demonstrated, not just my opinion, against blacks doing the same thing. They discriminated fully against whites for mortgages for central city homes by having higher interest rates. (A. 365a)

The sole testimony relating to local interference with suggested housing desegregation goes to the point that Richmond was unable to construct low-cost housing either within the city or in the adjoining counties. So far as Chesterfield is concerned the testimony is only that Chesterfield was not asked to allow Richmond to build low-cost housing in Chesterfield, allegedly because the county officials had indicated a distaste for low-cost housing (A. 617a). Henrico was never asked at all (A. 626a). But, even so, the petitioners' expert who presented the evidence on this subject admitted that the problem of "low-cost housing" was basically one of "class discrimination" rather than racial discrimination. Plaintiffs' witness, Frederic Fay testified:

Q Well, have you had any difficulty in purchasing sites that weren't located within the City of Richmond?
A Oh, yes, we always have difficulty in attempting to find sites even within the present City.

In other words, when you get out of the core area that is primarily occupied by the black people of the community, or is in transition, you have difficulty in acquiring site locations for these projects inside the City as well as outside. We have difficulty in finding sites even in completely black areas. Everyone thinks the [H-172] low rent housing program is a good one until it begins to touch their neighborhood. Then we find that class discrimination takes over and is perhaps

even more prevalent and vicious than racial discrimination. (A. 619a)

There was no evidence to contradict this fact about the lmost universal objection to low-cost housing installations. 'he people of central cities, no less than those of the subrbs, blacks no less than whites, do not want those projects ithin their immediate neighborhoods. That hardly adds p to a constitutional violation by the respondents on which predicate a school desegregation decree.

This Court held, in *James* v. *Valtierra*, 402 U.S. 137 1971), that one cannot equate the right to public housing ith the right to open housing.

> The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws." (402 U.S. at 142-43.)

f course, the state could not so condition the requirement r open housing. See *Hunter* v. *Erickson*, 393 U.S. 385 1969). Nor did the dissent in *James* v. *Valtierra* suggest e equation between public housing and housing for blacks, y more than did the majority.

What the petitioners have tried to assert is that there is mething attributable to local government activities in e Richmond area that causes blacks not to move to the burbs. But as their own expert testified:

> Q Dr. Taeuber, the last answer that you gave Mr. Lucas with regard to blacks moving into the periphery of the general area with which they have been previously contained, is this tendency to move into the periphery area, is this a national tendency? A Yes. This is what was examined in great detail in those ten cities that I mentioned earlier.
>
> [I-66] Q And this is characteristic of what happens all over the United States and not just what happens in Richmond? A That is correct.
>
> Q And what is happening in Richmond in this respect is similar to what is happening in every other standard metropolitan statistical area? A That is essentially correct. (A. 667a)

In short, there is absolutely nothing in the record to support the proposition that the demographic distribution in the Richmond SMSA, the racial imbalance between the city and suburbs, can in any way be attributed to actions by the respondents in this case.[15] In the absence of such evidence, there is clearly no constitutional violation to be found in the current discrepancies between white and black population on which to base a decree commanding the consolidation of three unitary school systems into one system assuring substantial white majorities in every school. Moreover, as this Court has said, even if racial concentration in housing exists, a judicially created school plan may not be used as a vehicle for curing this condition (*Swann*, 402 U.S. at 23):

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even

[15] So far as the question of propriety of school siting is concerned, see pp. 83-84, *infra*.

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when those problems contribute to disproportionate racial concentrations in some schools.

C. *Community of Interest.* It should be noted that to the extent that the City of Richmond takes seriously the notion that a single community of interest in Richmond and the adjacent counties gives rise to a constitutional requirement that the educational systems of the three local governments be combined, there are provisions of State law to cure the deficiencies alleged.

The State, exercising the power to define for "legitimate state purposes" the boundaries of its political subdivisions and the governmental functions to be delegated to each, has recognized the possibility of changing demography and changes in the communities of interest and has provided judicial machinery for making appropriate boundary adjustments.

> In Virginia, cities and counties are mutually exclusive. The area embraced within a city's limits is not a part of a county. Cities expand at the expense of the territory of an adjacent county, and Virginia has provided a judicial procedure as the means for extending the limits of cities. (*Holt* v. *City of Richmond*, 459 F.2d 1093, 1094 (4th Cir. 1972)

Indeed, as previously noted, Richmond has used that procedure time and again to expand its boundaries at the expense of each of the counties here involved. As recently as January 1, 1970, the boundary between it and Chesterfield has been judicially established after a long and tortuous review of all aspects of the existing community of interest.

It is true that the State has imposed a temporary moratorium on compulsory annexation while the legislature reviews the existing procedures for boundary change and

city-county relations but that moratorium expires shortly by its own terms. Moreover, as applied to Richmond and more particularly the class of black plaintiffs that now seeks joinder of the three school systems to secure a white majority student body in every school, members of that class have imposed a more difficult obstacle not merely to future annexation but even to the 1970 annexation. That class, while seeking to join the three school systems in order to secure a white majority in the classrooms is opposed to joining with the white parents of those children in a single municipality because it would dilute the power that black citizens might assert over the government of the City of Richmond. On the other hand, the City of Richmond was found, by the district court that rendered the judgment in this case, to favor an annexation of part of Chesterfield—not all of Chesterfield and Henrico—in order to assure white hegemony in the City of Richmond. See *Holt* v. *City of Richmond*, 334 F.Supp. 228, 236 (E.D. Va. 1971), rev'd 459 F.2d 1093 (4th Cir. 1972). Thus, the community of interest in sewers, hospitals, shopping centers, roads, etc., on which petitioners seek to predicate the proposition that there is a constitutional mandate to consolidate the three school systems, is obviously thought not sufficient to cause the same petitioner to join in accepting the fruits of a statutory remedy to bring together that which they have labeled a single community. We respectfully submit that the data on the so-called community of interest between the City of Richmond and Chesterfield and Henrico counties do not afford a constitutional base for restructuring these three governments piece-meal. Nothing in the record can sustain the existence of the constitutional violation required by this Court in *Swann:* "that either school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, . . ." 402 U.S. at 32.

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3. *History does not afford a constitutional violation on which to base the reconstruction of the three unitary school systems into a single racially-balanced system.* Very large portions of the trial Court's opinion and petitioners' briefs are devoted to the proposition, not that the respondents are now engaging in any wrongdoing, committing any "constitutional violation," but rather that sometime in the past they have engaged in activities that approved, encouraged, or effected unconstituional school segregation. There is, of course, no contest to be made over this aspect of Virginia's history, beginning with its membership in the Confederacy during the Civil War. But that history cannot warrant the action of the district court here.

There are three reasons why petitioners' parade of horribles should not afford a predicate for imposing a white-majority requirement on the school children of the City of Richmond and the Counties of Henrico and Chesterfield. First, that history is not reflective of the Commonwealth of Virginia of today and the time that the trial below occurred. Second, because historically the very evil to be abated was that contained in the proposed plan of consolidation, a plan constitutionally suspect, if not plainly invalid, under the very provisions of the Constitution of the United States on which petitioners purport to rely. Third, because such history, by itself, has never afforded the basis for relief even in the earlier days of misbehavior.

a. *Desegregation in Virginia.* By the time of the trial of this case, each school division in the Commonwealth was operating under HEW or Court approved desegregation plans.

The success of Virginia's integration efforts is even more dramatically underscored when compared with the national averages. In 1968, 29.8% of Virginia's black stu-

dents attended schools which were at least 20% white. In 1968, 32% of the Nation's black students attended schools which were at least 20% white. In 1970, 69.8% of Virginia's black students attended schools which were at least 20% white. In 1970, only 50.6%, or 19 points fewer than Virginia's average, of the Nation's black students attended schools at least 20% white. Over the two year period, Virginia, starting with a comparable base, was able to achieve an improvement of 40 points while the national increase was only 18 points. Recent figures show that for the 1971-72 school year, Virginia continued to outdistance the nation, for in Virginia 88% of the black students now attend schools at least 20% white while HEW estimates that in the continental United States only 54% of the black students attend schools at least 20% white. (A. 709a; HX 39).

The culmination of Virginia's repudiation of "massive resistance" is demonstrated not only in the foregoing factual statistics, it is perhaps best shown in the attitudes of Virginia's people. The Commonwealth has now written the guarantees of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States into the organic law of Virginia by adopting Section 11 of Article I of the Constitution of 1971, which provides:

> . . . the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged. . . .

This constitutional provision is an affirmative declaration of racial equality as the fundamental law of the Commonwealth of Virginia against which no governmental statute, policy, or practice to the contrary can prevail.[16] The

[16] Virginia's dedication to the concept is attested by the enactment, in 1972 and the strengthening in 1973, of the Virginia Fair Housing Law which parallels the federal statutes. (Va. Code §§ 36-86 et seq.)

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position advocated by the State and County defendants fulfills the guarantees of the Constitution for, unlike the City of Richmond, the State and County defendants do not seek to relegate their black citizens to another generation of inferior status by chaining them to a school attendance plan designed to insure that the black color of their skin will forever prohibit them from gaining a majority in a single school much less an entire school division. See *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County*, 429 F.2d 820 (4th Cir. 1970) (Sobeloff, J., concurring).

b. *Black majorities as intrinsically invalid.* The history on which petitioners would now premise their right to relief is a history that embraced rather than rejected the petitioners' essential argument that black majority schools are intrinsically inferior to white majority schools. It is a history on which Virginia has turned its back and which petitioners would once more revive. As counsel for the N.A.A.C.P. argued in the *Brown* cases, in 1955, segregationist states could condone the insertion of minorities of blacks in white schools; what they could not tolerate was the possibility of white students in majority-black schools. The N.A.A.C.P. counsel made the point this way in his oral argument before the Court on the question of appropriate relief:

> As to what runs through all of these arguments of the states, if I remember correctly, practically every Attorney General who appeared before this Court and those representing the Attorney General either began or some time in the argument said there was no race prejudice involved, there was no racial hatred involved, there was no bitterness involved.
>
> And then I think you can take the balance of each

argument made by the State Attorneys General and find out whether or not that is true.

Most if not all of them said that it was all right, there were very few Negroes involved like in Arkansas, that it is possible they could be integrated, that there might not be friction.

And then they said "However, where there are a large number of Negroes involved and only a small number of white people involved, that is the most horrible situation."

So on the one hand they say that where the majority, the big majority are white, a very small minority is Negro, you can do it, that is the most feasible, the nicest problem.

And the other is the reverse; well, the only way to understand that is that in one category you have a small number of white students, and the only difference between the two is Negro and white, and if that is not race I don't know what race is.

And that is the argument that is made throughout these cases. (Friedman, ed., *Argument: The Oral Argument before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55*, p. 524 (1969))

Certainly there is irony in the fact that it is the N.A.A.C.P. that now fosters the argument that it once attributed to the states as the epitome of racial segregation, of Negro degradation, namely that black majority schools are intrinsically inferior.

The unconstitutional evil to be abated by the school desegregation cases was the label of inferiority imposed on blacks, the classification by law of blacks as improper classmates for whites, the notion that schools with black majorities by definition are inherently inadequate schools. The proposal of the petitioners here is, in fact, that this unconstitutional standard now be constitutionalized. The petitioners have adopted what Professor Jencks described thus: "The 'liberal' alternative, which is widely viewed as

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road to racial equality, seems to be compulsory busing blacks to white neighborhoods, and vice versa. This ies that black parents cannot send their children to all-k schools, even if they want to, because all-black schools *by definition* inferior. This position strikes us as both st and politically unworkable over the long haul." cks, *Inequality: A Reassessment of the Effect of Fam-nd Schooling in America*, 40-41 (1972))

was this "liberal alternative" proffered by the peti-ers that was rejected by the black parents of Atlanta, rgia, in their school desegregation case, with the some-approval of Mr. Roy Wilkins, the executive director .A.A.C.P., who said: "Our general position has beea t] there is no sacrifice of racial pride or loss of edu-n if blacks go to schools with blacks. If the school d agrees to the improvement in education and a pro-n that leads to meaningful equalization of the educa-l process, black children will not suffer by attending l-black school." (*Washington Post*, February 28, 1973, 25.)

should be noted that here, unlike the Atlanta situation, ssue is not the maintenance of all-black schools within hool system, but the maintenance of a unitary school em with a majority of black students in each school in the system. It should be noted that here, unlike the nta situation, there is no suggestion by petitioners that Richmond schools are in any way, shape, or form, in-r to the schools of Chesterfield and Henrico, except that former has a black majority student body and the latter white majority student bodies.

the history of school segregation speaks to any con-on, it speaks to the need for this Court to reject a titutional proclamation that a black majority school m adjacent to a white majority school system consti-

tutes "invidious discrimination" against the black school children attending the majority-black schools. That would, indeed, be turning back the clock.

c. *Irrelevance of history after a unitary system is effected.* Finally, a history of segregation in a State becomes irrelavant once a school system has achieved unitary status. This Court specifically so held in *Swann:*

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I* [to eliminate the maintenance of "two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race (402 U.S. at 5-6)]. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. (402 U.S. at 31-32.)

Clearly this is a rejection of petitioners' basic proposition that a past of segregation is all that a district court needs as justification to go beyond dismantling a dual system, and establishing a unitary system, *i.e.,* to require the

balancing of the white:black ratios within three adjoining school systems, preferably in a ratio approximately 7:3 in every school.

4. *Even if the State Board had the power to consolidate the three systems, its failure to do so did not violate the Constitution so as to afford a predicate for the trial court's plan.* Still one more argument offering a predicate of constitutional violation is again circular. In essence it is the proposition that the district court can compel the reorganization of the school systems of Richmond, Henrico, and Chesterfield to effectuate a racial balance among them because the State Board of Education and the local boards could have done so voluntarily but have failed to do so. It should be sufficient to answer that since there was no constitutional compunction on the respondents to achieve a racial balance among the three school systems, their failure to do so can hardly provide constitutional authority for the district court to compel them to do so.

a. *State Board's lack of authority.* Essentially, the petitioners' proposition is that the State Board of Education had the power to compel consolidation of the three school systems—thereby effecting a racial balance among them—and, therefore, it had to do so. The premise is in error because the State Board of Education has never had the authority to compel consolidation of school systems. The law on this subject is, perhaps, best expounded by the Court of Appeals for the Fourth Circuit, because of its particular expertise in the law of Virginia:

> Section 133 of the 1902 Constitution of Virigina provided that "the supervision of the schools in each county or city shall be vested in a school board." But school boards, per se, including a court-ordered consolidated school board, are not authorized by law to

raise funds for the schools. Instead, under Virginia law, a school board is fiscally dependent upon the local governing body, *e.g.*, county commissioners or city council, and have no authority whatever to levy taxes or appropriate funds for school purposes.

Although it is true that under Section 132 of the 1902 constitution the State Board of Education can designate two or more counties or counties and cities as a single school division, and has done so on 28 occasions, Section 133 of the constitution contemplates that even after such "consolidation" the separate school boards of the combined units are to continue to function.

In 1954 the General Assembly of Virginia enacted Virginia Code 22-100.1 et seq. Under these statutes a multi-unit school district with a single school board could be established, but only by the majority vote of the school board of each affected county and/or city and with the approval of the governing body of each affected unit and the approval of the State Board of Education. Such a school division has never been established in Virginia. Prior to the order entered in this case on January 10, 1972, neither the school boards of Richmond, Henrico or Chesterfield nor any of the governing bodies of these units ever requested the State Board to take such action.

Under the new Constitution of Virginia the State Board is given power to divide the Commonwealth into school divisions subject to "such criteria and conditions as the General Assembly may prescribe. At its extra session of 1971, the General Assembly enacted into law Virginia Code § 22-30:

> (1) No school division shall be composed of more than one county or city.
>
> (2) No school division shall be composed of a county or city and any one of the following towns: Abingdon, Cape Charles, Colonial Beach, Fries, Poquoson, Saltville, or West Point.

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> Notwithstanding any of the above criteria and conditions, the Board of Education may, upon the request of the school boards of the counties, cities, and towns affected, concurred in by the governing bodies thereof, consolidate or otherwise alter school divisions.
>
> Thus neither under the old constitution and statutes in effect prior to July 1, 1971, nor under the new constitution and statutes in effect after that date, could the State Board of Education, acting alone, have effected the consolidation of the school systems of Richmond, Henrico and Chesterfield into a single system under the control of a single school board. (462 F.2d at 1067; Pet. A. 577a-578a.)

It is thus apparent that the State Board was not authorized, much less charged with a duty, to consolidate these school systems.

The only reasons offered in support of petitioners' argument that the State Board should have compelled consolidation, even though it had no authority to do so, were: (1) without the consolidation, there was and would be "white flight" from the city to the suburbs; (2) the siting of schools, for which the local school boards had responsibility, subject to approval of the State Board, was not accomplished in a manner to contribute to better racial balance among the three communities.

b. *White flight.* The "white flight" argument is purely speculative and unsupported by fact. The record is clear that there has been no "white flight" from Richmond to the suburbs despite the increasing proportion of black students in Richmond, either (1) in the decade before Plan III went into effect, (2) in the year before Plan III went into effect, or (3) in the years during whch Plan III has been in effect. Thus, despite the nationwide movement to the

suburbs already discussed (See pp. 61-62, *supra*), of the 34,000 pupils registered in Henrico County Schools for the school year 1970-71, only 2,035 (5.9%) had transferred from Richmond City Schools during the preceding decade, and 532 of them were black students. Of the 2,500 pupils listed as "missing" from the Richmond schools for the 1970-71 school year, only 145 enrolled in Henrico schools, of whom 30 were black students. (A. 984; HX 30) Of the 20,676 Chesterfield school children enrolled in 1970-71, only 1,335 transferred from the Richmond schools during the preceding 12 years. Of this number 1,299 were white and 36 were black. Only 6.46% of the Chesterfield school population came from Richmond schools. (CX 34) There was a 3,703 decrease in Richmond enrollment in 1971-72, but these students obviously did not move to Henrico, which itself had a loss of 300 students, or to Chesterfield, which also lost 208 students. (RX 98; HX 40, CX 41, A. 155a-161a; A. 163a). In 1972-73, there were 859 students who transferred from Richmond schools to the suburban schools, of whom 286 (33.3%) were black. At the same time there were 309 students who transferred from the suburban schools to the Richmond schools, of whom 98 (31.7%) were black. The Chesterfield schools have maintained a 9% black student body during the three-year period of Richmond school desegregation; the Henrico schools have moved from an 8% black ratio to a 10% black ratio during the same three-year Richmond school desegregation period.[17] These data hardly reflect a "white flight" of school students to the suburban schools from the Richmond schools.

In any event, there is no demonstration that there is any cause and effect shown between the desegregation of the

[17] These post-trial data are taken from official reports to HEW by the school boards, filed with the State Board of Education.

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Richmond schools—on the basis of which "white flight" is predicated—and the movement to the suburbs. As Norman Chachkin of the NAACP Legal Defense and Education Fund, who argued the cause for the NAACP below, told the National Association of Teacher Attorneys, in Phoenix, Arizona on November 4, 1971:

> The quest for school desegregation, on the other hand, has always involved both urban and rural areas. What is perhaps most curious is that the impetus for school desegregation coincided with a period of fantastic suburban growth and change in the demographic characteristics of our cities. Many people have associated the two phenomena together and presumed a cause-and-effect relationship which does not exist. In other words, efforts at desegregation (whether voluntary or mandatory) have been blamed for the exodus of the white middle class from many cities. The truth of the matter is that the process of suburbanization preceded and may well outlast the issue of desegregation.

c. *School siting.* On the issue of school siting, the facts leave no doubt about the absence of merit in the petitioners' charge that they were placed for purposes of preventing desegregation. Aside from the empty allegations of the petitioners that the respondent counties and the State Board of Education[18] failed to discourage the nationwide phenomenon of white population growth in the suburbs and black population growth in the cities, there was no suggestion whatsoever of how that could or should have been done. Nor could there have been. The schools were patently

[18] The sole authority asserted by the State Board with regard to school sites was to assure that the *size* of the site was adequate to the needs of the proposed school. See State Board Regs., *School Plant Planning and Contruction*, Regs. 10.411, 10.412, 10.413 (SX 4). *School Board of Carroll County* v. *Shockley*, 160 Va. 405; *Howard* v. *County School Board*, 203 Va. 55.

constructed by the three local school boards to provide for the school children in their respective jurisdictions for whom they were responsible and in response to overcrowding of existing schools by the population explosions. Population growth was the cause of, not the response to, school construction. There is nothing in the record to contradict the facts attested by respondents' witnesses in this regard.

In Henrico, there were 31 new schools and 36 school additions built between 1954 and 1971. They were all built "to take care of new homes and to relieve overcrowded conditions in school that might be around it." (A. 981a) Most of them were filled or overcrowded on the day that they opened. (A. 979a-980a) In Chesterfield, there were 33 new schools built in the last 20 years, some of which were in an area later annexed by Richmond. (A. 1000a) All the facilities were "close to being full at the time of opening." (A. 1000a) How and why these counties should have responded differently to the population pressures that caused the siting of their schools must remain a mystery, for the record is—necessarily—barren of any indication of segregational motive or effect in the construction of these facilities.

5. *Failure of respondents to offer an alternative plan of consolidation is not a conditional violation on which to predicate the validity of the plan imposed.* Equally unfounded is the penultimate argument afforded by the petitioners in lieu of a constitutional violation on which to base a right to the judicial decree compelling consolidation of the three school systems. The proposition offered is that the plan approved by the trial court was valid because the respondents failed to afford any alternative plan that would utilize assignment of the students of the three systems to effect a racial balance among them. But there was no reason to proffer such a proposal. The three school systems were each unitary systems meeting fully the requirements es-

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ablished by this Court under the Fourteenth Amendment nd the Department of Health, Education and Welfare nder the Civil Rights Act of 1964. Plans to compel effectuation of a racial balance among the three school systems—which is what petitioners now demand of the respondents—would be at least constitutionally suspect. Could the three school boards have joined for the avowed purpose of assuring—as the trial court's plan would do—that there be no schools with black majorities? Would not such state action fall afoul the Fourteenth Amendment if challenged by black plaintiffs on the grounds of racial discrimination?

Moreover to repeat what this Court said in *Swann:*

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding* of a constitutional violation, however, that would not be within the authority of a federal court. (402 U.S. at 16.) (Emphasis supplied.)

t is not possible to read this proposition, as petitioners ead it, to mean that the constitutional violation—the predicate for judicial cognizance of the question—is the failure f the school authorities to do that which this Court has aid is not constitutionally required.

6. *The proximity of majority-black schools to majority-hite schools does not afford a constitutional violation on hich to predicate the consolidation plan.* Petitioners make ne other argument in their vain search for a constitutional iolation on which to predicate the judicial action taken y the trial court. Like all their arguments it boils down

to the simple proposition that there must be racial balancing among contiguous school districts, as well as within each, where one of the systems has a majority-black school population and another has a majority-white school population. This time the argument is that black school children attending majority-black schools will necessarily feel inferior if there are white-majority schools nearby. This is to say either that majority-black schools are, in fact, inferior or that the black children attending them must believe them to be so. If such a proposition were to be adopted by this Court, it would have to endorse what it has heretofore rejected: an obligation to balance schools within a system as well as among systems, for surely the allegedly harmful effect would more likely occur where the schools of different composition were within the same system. As this Court stated in *Swann*:

> . . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. (402 U.S. at 24)

The Constitution precludes the separation of the races by governmental action, because of the constitutional principle that blacks and whites are equal before the law. Surely this Court will not undermine that principle by judicial declaration of the inferiority of black majority schools. It should not lend judicial support to a belief in the inferiority of black-majority schools. For it must recognize the adverse effect that such a ruling would have on students in black-majority school systems that are not contiguous to white-majority schools systems.

C. *Conclusion.* The "constitutional violation"—the necessary predicate for the trial court's intervention—has been offered by petitioners in the form of: 1) the need for a "viable racial mix"; 2) the demographic makeup of the three school systems and the political subdivisions in which they are located, without "a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools" (402 U.S. at 32); 3) an evil past of segregation in Virginia's history, without any nexus between such earlier misbehavior, since reformed, and the absence of racial balance between the city and the suburbs that the trial court sought to abate here; 4) the failure of the respondents to consolidate the three school systems to effect a racial balance among them; 5) the failure of respondents to have proffered a consolidation plan to the district court, and 6) the proximity of majority black schools to majority white schools, is, *per se*, a constitutional violation.

We respectfully submit that none of these propositions affords any constitutional violation that would justify the effectuation of the white-majority school concept embodied in the trial court's judgment in this case.

II

Factors To Be Weighed In Determining The Validity Of The District Court's Remedy.

"As with any equity case the nature of the violation determines the scope of the remedy." (*Swann*, 402 U.S. at 16.) It is difficult, therefore, to speak to the propriety of a remedy for a nonexistent violation. For, as this Court said in *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 464 (1972):

> We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of the separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable. We observed in *Swann, supra,* that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S. at 24.

Note that "racial imbalance" among schools even within a single system does not by itself warrant judicial action. If an injunction would be improper for the purpose of preventing the disjointing of a single school system to avoid racial imbalance, how much less justified must it be for the purpose of combining separate school systems to that end.

The four dissenting Justices in *Emporia* were fully in agreement that "racial balance," which they found to be the essence of the question, did not justify judicial interference with the creation of a separate school division.

> It is quite true that the racial ratios of the two school systems would differ, but the elimination of such disparities is not the mission of desegregation. We stated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S., at 24:
>
> > "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

It can no more be said that racial balance is the norm be sought, than it can be said that mere racial imalance was the condition requiring a judicial remedy. 407 U.S. at 473.)

* * *

If the severance of the two systems were permitted proceed, the assignment of children to schools would epend solely on their residence. County residents would tend county schools, and city residents would attend ty schools. Assignment to schools would in no sense epend on race. Such a geographic assignment pattern prima facie consistent with the Equal Protection lause. See *Spencer* v. *Kugler*, 326 F.Supp. 1235 (N.J. 971), aff'd, 404 U.S. 1027 (1972). (407 U.S. at 71-72.)

at the Court held in *Emporia* was that there must be onal contributing factors as a predicate for judicial factors other than mere racial imbalance.

White Flight." In *Emporia*, the Court found three actors, none of which is present here. The first of factors in *Emporia* was the evidence accepted by the that there would be white flight from the part of the having the larger proportion of black students to wly created city system. "Thus, in the judgment of strict Court, the statistical breakdown of the 1969- nrollment figures between city residents and county nts did not reflect what the situation would have been mporia established its own school system." (407 U.S. 65.) As we have previously shown, pp. 81-82 *supra*, not have to rely on surmise as to what would happen n the separate school systems here involved. The the matter is that the separation of the City of ond from the Counties of Henrico and Chesterfield isted since 1871. There have been three years of

actual experience under judicial decree desegregating the Richmond school system. The evidence is clear, as the Court of Appeals stated, that there has been no white flight from Richmond to the county schools of the kind that the Court anticipated in *Emporia*. (462 F.2d at 1065; Pet. A. 572a-573a) And there is no evidence of what "white flight" would occur from the proposed consolidated system with its necessarily extensive busing.

B. *Differences in School Quality.* "White flight" was only one of the factors that weighed against the propriety of the severance of the single school system into two school systems as contemplated by the City in *Emporia*. The second factor that was held relevant was the distinction between the quality of the schools that would be located in the two systems. "The record further reflects that the school buildings in Emporia are better equipped and are located on better sites than are those in the county. We noted in *Swann* that factors such as these may in themselves indicate that enforced racial segregation has been perpetuated." (407 U.S. at 465) There is no evidence in this record however, and there could be none, that the schools of Richmond are in any way inferior to those of the adjacent county school systems. So too, the second factor that militated against allowing the withdrawal of the city schools from the unitary school system is absent here.

C. *"Timing."* The third factor that made for the Court's conclusion that the single unitary system could not be broken down into two systems was the element of "timing":

> . . . While Emporia had long had the right under state law to establish a separate school system, its decision to do so came only upon the basis of—and, as the city officials conceded, in reaction to—a court order that prevented the county system from maintaining any

longer the segregated system that had lingered for 15 years after *Brown I*. (407 U.S. at 465.)

timing factor here also weighs against the redrawing school system lines. For, here the Richmond school em, which long had the right to offer a plan of desegre- on of its schools, did not offer this one for consolidation the county school systems until after the district court imposed upon the Richmond school system a unitary em in lieu of the dual system that had existed until the of the Foster Plan and Plan III. Not until there was itary system in Richmond was there any suggestion, by er plaintiffs or Richmond that there was a need for olidation, just as the effor' to dismember the system in *poria* did not come until after an order effecting a unitary em.

is clear that the reasons for denying the separation of and county into two school systems in *Emporia*, for pelling them to remain as a single unitary system, are er not present here or weigh in favor of the maintenance he three unitary systems already in existence in the e political subdivisions. There is no disparity between quality of the three school systems now existing; there idence here that "white flight" to the county schools is xistent; Richmond's "timing" for the consolidation plan es it clear that its purpose and effect was to avoid the tuation of a unitary system that would provide black rities within the desegregated schools of Richmond.

the same time, the factors that were considered to ate against the separation of the county and city schools *mporia* must weigh even more heavily in favor of per- ng the counties here to maintain their own school ms, just as they have done since 1871. Emporia was not ty of the second class" until 1967, two years after the

desegregation suit began. It had never run its own school system. "Both before and after it became a city, Emporia educated its children in the county schools." 407 U.S. at 459. The reason that it became a city was that it was "apparently dissatisfied with the county's allocation of revenues from the newly enacted states sales tax." 407 U.S. at 454.

D. *Local Control.* Both the majority and minority of the Court recognized Emporia's interest in control over its proposed, nonexistent school system. As this Court said only the other day, in *San Antonio School District* v. *Rodriguez,* No. 71-1332, decided 21 March 1973, slip opinion, pp. 45-46:

> . . . The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.,* at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.,* at 478.
>
> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how these local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of

the peculiar strengths of our form of government each State's freedom to "serve as a laboratory . . . and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

The respective municipal governments of Richmond, esterfield, and Henrico have always—since the creation public school systems—had "control over decisions vitally ecting the education of [their] children . . . a need that is ongly felt in our society."

For the dissenters in *Emporia*, the concept of local con- l of schools weighed even more heavily than it did for majority:

> This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extra-curricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns. (407 U.S. at 477-78.)

2. *Integrity of Political Subdivisions.* The rule that ool system boundaries long concurrent with municipal ndaries are not to be destroyed by a federal district rt because of the racial disparities among the school

systems, explicit in the *Emporia* case, was made more explicit by this Court in its affirmance of the New Jersey district court in *Spencer* v. *Kugler,* 326 F.Supp. 1235 (D.N.J. 1971), *aff'd,* 404 U.S. 1027 (1972), albeit over the vigorous dissent of Mr. Justice Douglas.

In *Spencer,* a challenge to the constitutionality of New Jersey's statutory scheme establishing the boundaries of school districts to coincide with those of political subdivisions was dismissed for failure to state a claim upon which relief could be granted, even though the complaint alleged that patterns of racial imbalance were being statutorily imposed upon the public schools of New Jersey.

The complaint in the *Spencer* case was quoted by the three-judge court and reveals the essence of its thesis to be the same that is in issue here. (326 F.Supp. at 1240.) The Court of Appeals for the Fourth Circuit appropriately stated:

> . . . We think *Spencer* v. *Kugler, supra,* is indistinguishable and controls decision in this case. (462 F.2d at 1070; Pet. A. 582a)

The holding of the New Jersey district court was as follows:

> . . . It is clear that these legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made. The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority. The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local

school district results from an imbalance in the population of that municipalty-school district. Racially balanced municipalities are beyond the pale of either judicial or legislative intervention. (326 F. Supp. at 1240.)

t was this judgment, on facts essentially identical with se in this case, that this Court affirmed summarily on ground that it presented no substantial federal question. is was done, as has been noted, over the dissent of Mr. tice Douglas who presented the arguments on which the itioners would rest here.

Mr. Justice Douglas suggested that judicial power could ropriately be asserted on the analogy to some of this rt's decisions in reapportionment cases. We respectfully mit that he was mistaken in this regard. In the only pportionment case that could be deemed analogous to the tual situation here, where Congressional districts were wn in such a manner as to create a largely black district .3%) contiguous to districts containing high proportions of whites (94.9%; 71.5%; 72.5%), this Court specially refused to order the redrawing of the district lines order to secure a better racial balance among them. *ight* v. *Rockefeller*, 376 U.S. 52 (1964). In the absence a showing that the lines were "the product of a state rivance to segregate on the basis of race or place of rth" (376 U.S. at 58), the Court refused to strike down legislature's districting.

Only this Term, this Court in another reapportionment ruled that municipal boundary lines were a proper s for qualifying the rigidity of the one-man, one-vote , although the undiluted right to equality of representa- has been established as a constitutional right while the t to racially balanced school systems has not. In *Mahan Howell*, Nos. 71-364, 71-373, and 71-444, decided Febru-

ary 21, 1973: "With one exception the delegate districts followed political jurisdictional lines of the counties and cities." (Slip op., pp. 3-4.)

Moreover, it should be noted that no opinion of this Court, or any other that has come to our attention, has authorized a federal court to redraw the lines of municipal government for the purposes of its internal affairs except where these lines have been created for unconstitutional ends. Yet, what the trial court proposed to do here was to take away from the city and counties their primary function of local government: education, and to assign this function to a governmental body that would be created by the district court, without vestige of authority either in Virginia law or the decisions of this Court.

The fact is that this Court has justified judicial demands for redrawing lines of local government only where it has been shown that the states had drawn those lines to the end and with the effect of depriving some of its citizens of their constitutional rights. "Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot*, 364 U.S. 339." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 311 (1966). "A state cannot of course manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race." *Sailors* v. *Kent Board of Education*, 387 U.S. 105, 108-09 (1967).

Not even the petitioners assert that the political boundary lines in this case were created to the end of racial discrimination. They concede that they were not (A. 133a, 134a). The only racial gerrymandering that is involved in this case is that which would be imposed by the district court by redrawing these long existent lines in order to effect a "viable racial mix" among the three school systems. The petitioners have offered this Court not a single instance of

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e exercise of judicial power to redraw lines of local gov-nment where the lines themselves had not been created effect a constitutional violation.

As the minority in *Emporia* pointed out, State governents may establish their own political entities so long as, d that is the case here, the municipalities are "bona fide litical entit[ies] . . . not . . . used as a cloak for evasive tion." (407 U.S. at 479.) The bona fides of the Virginia an of local government was specifically found justifiable these Justices and there was no contradiction of this oposition to be found in the majority opinion:

> The discretion of a district court is further limited where, as here, it deals with totally separate political entities. This is a very different case from one where a school board proposes attendance zones within a single school district or even one where a school district is newly formed within a county unit. Under Virginia law, Emporia is as independent from Greensville County as one State is from another. See *City of Richmond* v. *County Board*, 199 Va. 679, 684, 101 S.E.2d 641, 644 (1958); *Murray* v. *City of Roanoke*, 192 Va. 321, 324, 64 S.E.2d 804, 807 (1951). This may be an anomaly in municipal jurisprudence, but it is Virginia's anomaly; it is of ancient origin, and it is not forbidden by the Constitution. To bar the city of Emporia from operating its own school system is to strip it of its most important governmental responsibility, and thus largely to deny its existence as an independent governmental entity. It is a serious step and, absent the factors that persuade me to the contrary in *Scotland Neck*, decided today, I am unwilling to go that far. (407 U.S. at 478)

There are, of course, cases in which the courts have mpelled changes of *attendance zones* within a school sys-n that was under a mandate to desegregate its schools. at is because the constitutional duty imposed by this

Court since 1954 has been for the desegregation of individual school systems. The individual school systems in this case have been desegregated in conformity with that mandate. The attempt here is to go beyond the desegregation of a school system to effect a racial balance among contiguous school systems. Althought the racial disparity between city and suburban school systems on which petitioners rest their case is not a new phenomenon, no such injunction as the petitioners seek here has ever been issued by a federal court. In none of the plethora of school desegration cases that have been brought in this country has judicial authority extended to redrawing municipal boundaries in the absence of showing abuse of state authority in the creation of these lines.

F. *Busing.* There are still further weights to be thrown on the scales against the propriety of redrawing the school systems lines in order to consolidate them. As the respondents told the Court of Appeals on oral argument, and as the Court of Appeals stated in its opinion (462 F.2d at 1061, n. 2), this is not a busing case. It is not a busing case in the sense that there is no challenge to the use of busses as a tool toward desegregating a school system. But the busing factor is one, nevertheless, to be weighed in determining the propriety of the plan approved by the trial court. The consolidation plan calls for busing some 78,000 of the 104,000 students in the proposed combined systems. It requires busing for long distances and over long periods of time. The conservative estimate of petitioners' experts was that the average distance for busing elementary school students would be 6.6 miles in the first subdivision; 7.3 miles in the second; 7.9 miles in the third; 8.7 miles in the fourth; 7.5 miles in the fifth; and 17.3 miles in the sixth. (A. 216a) The expectation was that the longest distances of travel for each zone would be 50% greater (A. 217a); *i.e.*, 9.9 miles

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in the first division; 11 miles in the second; 11.9 miles in the third; 13.1 miles in the fourth; 11.3 miles in the fifth; and 26 miles in the sixth. The optimistic time range was between fifteen and fifty minutes in each direction. (A. 231a) That these were optimistic estimates was established by uncontradicted testimony about trial runs of routes constructed in accordance with the petitioners' formula, one of which turned out to be 61.6 miles long and two and one-half hours in duration in each direction (A. 1005a-1006a), others of which were 45.6 miles long and 54.4 miles long taking two and two and one quarter hours respectively in each direction (A. 990a-997a). Admittedly, these would be extremes. They are nonetheless suggestive of the overly optimistic estimate of the times and distances that would actually be involved.

The essential evil in the busing system proposed under the plan, however, goes not to the time or distance to be consumed in the busing procedures, but to the method of selection of students to be bussed and the manner of their busing. Selection would be made by a military draft-like birthday lottery. Transportation would be by segregated busloads of all black students or all white students, blacks out of the city of Richmond and whites into the city of Richmond. If three systems are to be consolidated to effect racial balance, there is concededly no alternative to busing blacks in one direction and whites in the other. The evils of segregated busing to this end was, perhaps unwittingly, described by Dr. Pettigrew himself at the trial. When queried about the contribution of parochial and private schools to the school segregation problem, he thought them to be either the "second" or the "third" "major cause of segregation in central cities." He went on to say: "The best way to generate their religion and their prejudice I have ever seen, is to bring kids over to a class and take

them back as a class." (A. 364a) And this is the essence of the problem of the kind of busing necessary to effectuate a central city-suburban consolidation of school systems.

G. *Size.* Still one more factor of the kind weighed in *Emporia* is the question of the size of the proposed new system. When the optimal size of school systems is generally considered to be a minimum of 20,000 and a maximum of 50,000 students (462 F.2d at 1068; Pet. A. 578a-579a),[19] the proposed plan—again a certain result of combining three optimum-size separate school systems—would create a huge unwieldy single system, here one of 104,000 students. Richmond and Henrico were already in the top 1.1% of school system populations in the United States and Chesterfield was in the upper 3.4%. (SX 12; A. 145e-147e) In the United States in 1970, of the 17,498 school systems only 0.2% had 100,000 pupils or more. (SX 12)

H. *School Financing.* It must be recognized that the school systems involved here, unlike some of those in the cases on which petitioners would rely, are not school systems too small to be viable and which, in order to effect desegre-

[19] See, James B. Conant: *The American High School Today*, 1959. Katherine M. Cook: *Reorganization of School Units*, U.S. Office of Education, Bulletin No. 15, 1936. Howard A. Dawson: *Satisfactory Local School Units*, Field Study No. 7, George Peabody College for Teachers, 1934. C. F. Faber: *Measuring School District Quality*, American School Board Journal, October 1964. Charles F. Faber: *The Size of a School District*, Phi Delta Kappan, 1966, pp. 33-35. Calvin Grieder, Truman M. Pierce and K. Forbis Jordan: *Public School Administration*, (New York: The Ronald Press Company, 1969). Michael E. Hickey: *Optimum School District Size*, ERIC Clearinghouse on Educational Administration. John W. Bell and Arthur S. Green: *"Why Not Vertical Administration?"* American School Board Journal, December, 1957, pp. 25-26. Paul R. Mort and Walter C. Reusser: *Public School Finance*, Second Edition, 1951. Arthur D. Swanson: *Relations Between Community Size and School Quality*, Institute of Administrative Research, RESEARCH Bulletin, October, 1961.

gation, may well have to be combined. Nor does this case involve a disparity of financial resources of each local community so that one of the three cannot receive adequate financial support from the government that has responsibility for it. Chesterfield has a tax base in excess of $28,000 per student, Henrico in excess of $31,000 per student, and Richmond in excess of $32,000. (SX 2; A. 1086a) Whether that tax base would be utilized by the citizens of the three communities as generously after consolidation, when the school systems are no longer the responsibility of the taxing bodies to which they were once attached, is more dubious in prognosis than the question of "white flight." School bonds are never popular. They are extraordinarily difficult of passage where the students for whom they provide are not attending schools for which the taxing body is responsible. It might prove to be necessary, if there were a consolidation that separated the school systems from their municipal governments, for the federal courts also to undertake the transfer of the power to tax from those municipal bodies either to itself or to whatever local government the federal district court might choose to create.[20] But that was exactly what was forbidden to federal courts in *San Antonio School District* v. *Rodriguez*.

On the problem of separating school systems from their local tax base this Court said at p. 36 of the Slip Opinion:

> . . . We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to con-

[20] "But even if we were to ignore Virginia law, as we are urged to do, *there are practicalities of budgeting and finance that boggle the mind*. Each of the three political subdivisions involved here has a separate tax base and a separate and distinct electorate. The school board of the consolidated district would have to look to three separate governing bodies for approval and support of school budgets." (462 F.2d at 1068; Pet. A. 578a) (Emphasis supplied)

demn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. . . .

1. *Impracticality.* Among the factors to be weighed by this Court in determining the propriety of the proposed consolidation plan is the fact that the consolidation of the three school systems to achieve racial balance would be all but impossible of wider application even in the limited area to which Chesterfield and Henrico counties are contiguous, much less the State of Virginia and the other States of the Union. Richmond with its majority black school population is surrounded by Chesterfield and Henrico Counties with a majority white population. But Chesterfield and Henrico counties are, in turn, surrounded by a ring of counties in all of which the school systems are again desegregated, but many of which are majority black.[21] If there is to be a racial balancing achieved between Henrico and Chesterfield, on the one hand and Richmond on the other, it would necessarily follow—for nothing in the record distinguished the relationship of the school systems of the counties to the city from the relationship of the school systems of the two counties to those of the surrounding counties—that a balance should be struck between the white-black ratios in Chesterfield and Henrico and in Amelia, Charles City, New Kent, Dinwiddie, and Goochland Counties and the City of Petersburg as well. Dr. Pettigrew called this a benign "domino theory" which he applauded. (A 359a) And Dr. Little would have recommended it if Richmond schools had a "viable racial mix" of their own. (A. 263a-264a) And the trial court expressed the same view. (A. 261a) But it

[21] See, Appendix A, *post.*

ould be the courts that would face the difficult problem doling out the white students of Chesterfield and Henrico utward to the surrounding counties and inward to Richond) in order to bring about the "viable racial mix" which e district court decreed here. We respectfully submit that deral courts go beyond their authority and their competnce when they undertake to effectuate Judge Merhige's eory of racial balance among contiguous desegregated hool systems.

J. *"Metropolitanism."* Petitioners take exception to the nguage of the Court of Appeals which said the "federal strict court had undertaken to 'compel one of the States the Union to restructure its internal government' (462 2d, at 1060, Pet. A. 562) 'for the purpose of achieving cial balance' (ibid.)." Petitioners' Brief No. 72-550, p. 50. erhaps the Court of Appeals should have anticipated the nief Justice's language in the *Emporia* case: "To bar the y of Emporia from operating its own school system is to rip it of its most important governmental responsibility, d thus largely to deny its existence as an independent govnmental entity." 407 U.S. at 478. It is this governmental organization that made the Court of Appeals determine at the trial court's order effectuating the consolidation an was violative of the Tenth Amendment (462 F.2d at 061, 1068; Pet. A. 563a, 579a). The proposed decree is, erefore, also inappropriate for a court of equity because clearly violates the powers reserved to the states by the nstitution of the United States.

The essence of the petitioners' position, as is made clear plaintiffs' petition for certiorari, is that "metropolitan" is a better form of local government than the existent vision of authority between cities and their surrounding ritories. The effect of the district court order is to im-

pose partial metropolitan government on Richmond and the adjacent counties of Henrico and Chesterfield. The creation of metropolitan governments is a most difficult and complex political problem. But it is a political problem that must be solved politically and not by the courts. The record here certainly does not warrant judicial intrusion into this highly political area. (cf. *San Antonio School District* v. *Rodriguez, supra.*)

K. *Conclusion.* There is no authority in the federal courts to restructure desegregated, unitary school systems by consolidating them in order to secure a racial balance within all of the contiguous school systems. There is neither precedent nor analogy where the school systems are already unitary, where they are economically and educationally adequate, where they are integral parts of the local government from which they would be severed. Even if the power existed to impose federal judicial will on state legislative discretion, it ought not to be condoned where the relevant factors weigh so heavily, as they do here, against the exertion of such extraordinary power.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits." (*Swann*, 402 U.S. at 28.) Clearly the district court decree goes beyond those limits.

III.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit is clearly in accord with the precedents and principles laid down by this Court. Petitioners have offered no "constitutional violation" on which to predicate any judicial relief, much less a consolidation decree the sole effect of which is to create a "viable racial mix" in all schools in all

ee systems; action which violates principles adhered to this Court through twenty years of deliberation and lgment.

Whichever thesis of the petitioners is considered, the estion comes down every time to whether a school system h a substantial black majority is necessarily inconsistent h the requirements of desegregation expressed by *Brown* l its progeny. For if a black majority school body is unconstitutional per se, the schools of Richmond are egregated as this Court has defined desegregation. If Richmond schools are found not to be unitary, it can y be because a black majority school system must always constitutionally defective if it is possible to create a ite majority by the importation of pupils from adjacent itical divisions. Neither racial balance nor any particular ial quota can be constitutionally required.

We respectfully submit that this Court cannot, con-tently with the principles that it has enunciated from *own* through *Swann*, approve the concept that systems h black school majorities are intrinsically poorer school tems than those with white majorities. It would have to ect its own teachings about the equality of the races reverse the judgment of the court below. We respectfully uest that this Court adhere to its principles and affirm judgment of the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE

The undersigned, a member of the bar of this Court, hereby certifies that on the 31st day of March, 1973, he served three (3) copies of the foregoing Brief for Respondents upon all counsel for all parties required to be served by depositing same in the United States mail, first class postage, prepaid, addressed as follows:

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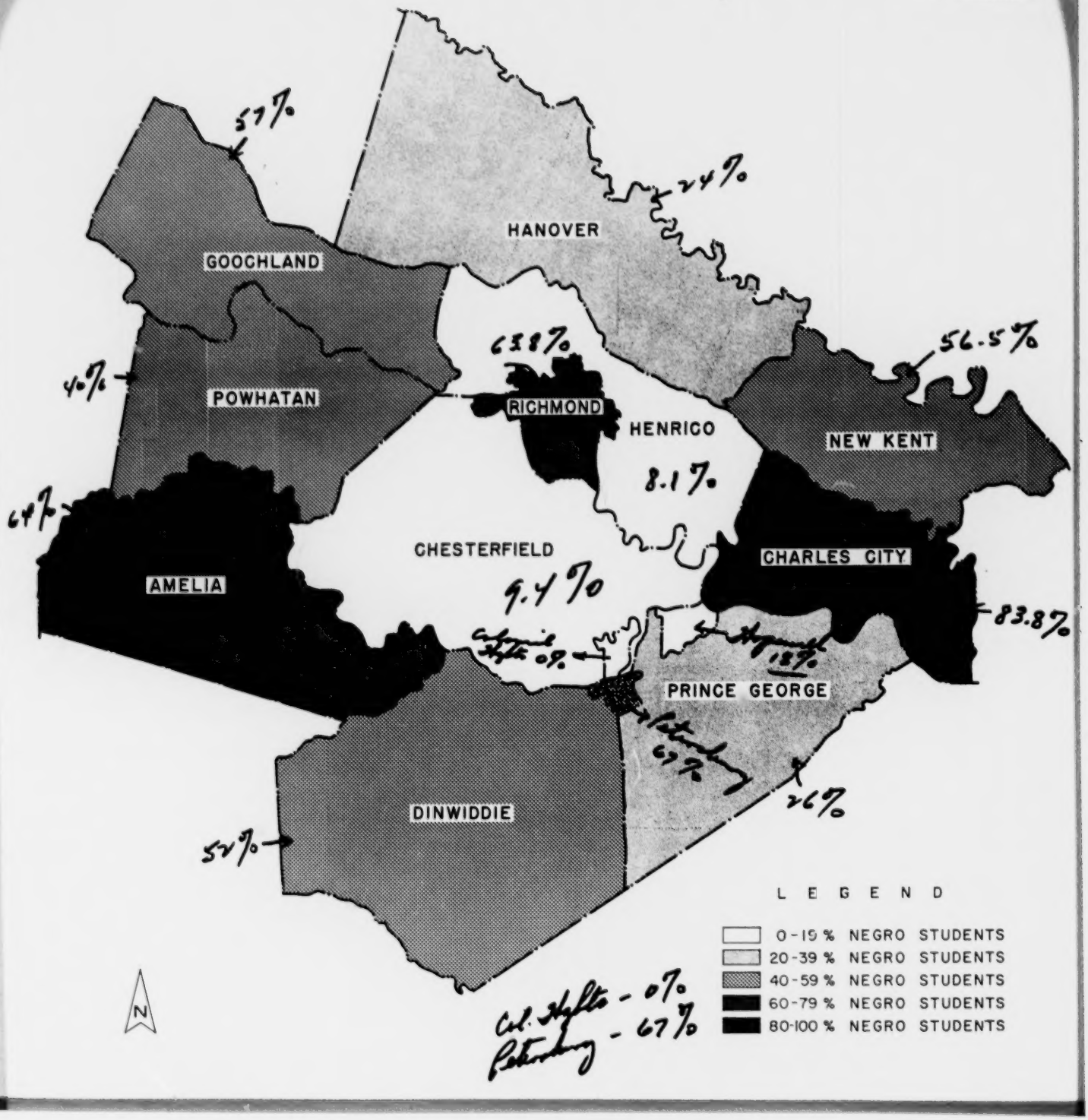
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